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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

THOMSON PHOSPHATE COMPANY,
Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Atlantic Coast Line Railroad Company, et al. (hereinafter referred to as ACL) respectfully prays that a writ of certiorari issue to review the final judgment and the opinion of the Court of Appeals for the Second Circuit, entered on November 24, 1970.

Opinions and Orders Below

On May 20, 1968, the District Court for the Southern District of New York entered partial summary judgment in favor of petitioners on ACL's motion to set aside and

annul the reports and orders of the Interstate Commerce Commission in *Thomson Phosphate Company* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 and 311 I.C.C. 315, and remanded said reports and orders to the Commission for action consistent with the opinion of the Court. The reports and orders of the Commission are set forth in the appendix hereto (pp. 4a-17a). The opinion and order of the Court is set forth at pages 30a-52a thereof.

On November 24, 1969, the District Court for the Southern District of New York, in an unreported opinion, denied ACL's motion to set aside and annul the Report and Order of the Interstate Commerce Commission on Reconsideration, 332 I.C.C. 691. Copies of the opinion and order of the District Court and of the report and order of the Commission are set forth in the appendix hereto at pages 60a-62a and 53a, respectively.

On June 8, 1970, the District Court entered judgment in favor of Thomson in the amount of $6,469.32, together with an attorney's fee in the amount of $2,156.44 for Thomson's attorney.

The opinion of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, has not yet been reported. A copy thereof is set forth in the appendix (pp. 63a-68a).

A copy of the order of the Court of Appeals for the Second Circuit, dated January 4, 1971, denying ACL's timely petition for rehearing, is set forth in the appendix (p. 69a).

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is November 24, 1970. It was entered on the same day. A copy of that judgment is appended hereto at page 63a.

The date of the order of the Court of Appeals denying ACL's petition for rehearing is January 4, 1971. A copy of that order is appended hereto at page 69a.

This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1).

Question Presented

Was the Commission without jurisdiction to consider Thomson's complaint (Docket 32065) because Rule 1.25(f) of the General Rules of Practice Before the Commission, like Section 16(3) of the Interstate Commerce Act, is jurisdictional, and failure to comply strictly with the provisions thereof deprived the Commission of jurisdiction to consider the complaint.

Statutory Provisions Involved

The statutory provisions which this case involves are the Interstate Commerce Act, as amended, 49 U.S.C.A. § 16(3)(b), 49 U.S.C.A. § 17(3), and Rules 25(e) and 25(f) of the General Rules of Practice Before the Commission, 49 U.S.C.A. App. 283 and U.S.C.A. App. 283-284, respectively.

Statement of the Case

A. The Facts.

On May 10, 1946, Thomson Phosphate Company (hereinafter referred to as Thomson) filed an informal complaint with the Interstate Commerce Commission (hereinafter referred to as the Commission) seeking reparation on an undisclosed number of carload shipments of phosphate rock from Prairie, Fla., to all destinations in Illinois, alleging that the applicable rates were unreasonable, in violation of Section One of the Interstate Commerce Act. Thereafter ACL wrote the Commission offering to dispose

of the informal complaint by making reparation "as to all shipments involved in this informal complaint upon which the statute of limitations has not run * * * by observance of the basis fixed by the Interstate Commerce Commission in the *Diamond Fertilizer Case,* 256 I.C.C. 747; 259 I.C.C. 75", a basis somewhat higher than that sought by the complaint. The Commission submitted ACL's compromise offer to Thomson, who advised the Commission that "the complainant is agreeable to the offer of adjustment made by the carriers in the matter". ACL thereupon prepared a special docket application seeking Commission authority to make reparation on the agreed basis. The application was executed by all participating railroads and Thomson, and submitted to the Commission which subsequently issued an order authorizing and directing ACL to make reparation on the compromise basis set forth in the application. ACL promptly complied with the Commission's order.

After accepting payment on the compromise basis, Thomson shortly thereafter requested ACL to make reparation on the basis originally sought by the informal complaint on those shipments on which reparation had not been made because the applicable charges were lower than those which would have accrued under the compromise basis, and thus were not entitled to reparation under that agreement. When ACL declined to make any further informal reparation, Thomson filed a formal complaint with the Commission (Docket No. 31124) alleging that the rates and charges assessed on 71 carload shipments from Prairie, Fla., to five specified destinations in Illinois were unreasonable, in violation of Section One of the Act. The complaint stated that the matter had been the subject of the informal complaint heretofore referred to. Some two months later Thomson requested the Commission to reopen the informal complaint, except as to the five destinations covered by the formal complaint, and the Commission's staff complied with that request. The Commission found the rates assailed in Docket No. 31124 unreasonable and

awarded reparation on a basis lower than the compromise basis agreed to by ACL and Thomson to dispose of the informal complaint.

About two years later Thomson again requested ACL to make informal reparation "on the shipments to the remaining Illinois destinations", but ACL declined to do so on the ground that the informal complaint was barred by the statute of limitations and Rule 25(f) of the General Rules of Procedure Before the Commission. On several subsequent occasions Thomson requested the Commission to reopen the informal complaint, and the Commission's staff granted each request, only to have ACL decline to change its contention that the informal complaint was barred. Eventually Thomson filed another formal complaint with the Commission (Docket No. 32065) alleging that the assailed rates were unreasonable. The complaint stated that the matter had been the subject of the same informal complaint heretofore referred to.

A report proposed by the hearing examiner set forth in chronological order and in greater detail the facts hereinbefore stated. The report pointed out that Rule 25(f) of the General Rules of Practice Before the Commission provides, among other things, that when an informal complaint cannot be settled informally the complaint is allowed an additional six months within which to "resubmit the informal complaint 'on an additional fact basis' ", a provision which had not been complied with. The examiner accordingly concluded that ACL made Thomson a compromise offer which was accepted without reservation, that "the contract resulting" was in fact approved by the Commission when it issued its order of September 19, 1950, based on the special docket application submitted to it, that a study of the situation on September 19, 1950, led only to the conclusion that the informal complaint had been satisfied and that no further complaint was pending. The examiner pointed out that "the limitation provided by Section 16(3) of the statute is jurisdictional and cannot be waived

by the Commission or its staff", and proposed that "The Commission should find that consideration of the rates assailed is barred by the statute of limitations provided in section 16 of the act".

The Commission reversed the examiner, without discussing the legal effect of the compromise settlement. It did discuss Rule 25(f), including its requirement for the resubmission of an informal complaint only "on an additional fact basis". It stated that the filing of Docket No. 32065 was "seemingly" in conformance with the "six months rule", and after discussing several "reopenings" and "closings" of the informal complaint concluded that the complaint was not barred and awarded reparation. On further hearing the Commission found Thomson entitled to reparation, with interest, and by order dated September 28, 1960, authorized and directed ACL to pay Thomson $8,889.76, with interest. Commissioner Walrath dissented on the ground that the complaint was barred by the statute of limitations.

On reconsideration (upon remand) the Commission concluded that its order of September 19, 1950, "authorized the railroads to pay reparation on 185 specifically enumerated shipments" and "That order did not by its terms authorize the railroads or the complainant to compromise any other claims that might be outstanding". It thereupon ordered ACL to pay Thomson $3,802.75, with interest from October 16, 1956.

B. Prior Proceedings.

These proceedings are the direct result of the decision of this Court in *ICC* v. *Atlantic Coast Line R. Co.*, 383 U. S. 586.

On September 6, 1961, ACL filed a complaint in the United States District Court for the Southern District of Florida, Jacksonville Division, under the provisions of 28 U.S.C.A. § 1336 and 1398, and Section 17(9) of the

Interstate Commerce Act, 49 U.S.C.A. § 17(9) seeking to enjoin, set aside and annul reports and orders of the Commission in the complaint proceeding before it. In its decision that Court (213 F. Supp. 199), made numerous findings of fact and conclusions of law in favor of ACL, including the conclusion that Section 16(3)(b) of the statute destroys the right as well as the remedy, that it is jurisdictional and limits the power of the Commission to consider a complaint, that accordingly Rule 25(f) must also be strictly construed, and that because of the failure of the several requests by Thomson to the Commission to reopen the informal complaint to include the "additional fact basis" required by Rule 25(f) the complaint was barred because the informal complaint could not have been reopened by the Commission under Rule 25(f).

The Commission appealed that decision to the Court of Appeals for the Fifth Circuit solely on jurisdictional grounds. It did not challenge the validity of the findings of fact or conclusions of law made by the Florida District Court. The Court of Appeals affirmed the action of the District Court in overruling the Commission's motion to dismiss for lack of jurisdiction, 334 F. 2d 46 (1964).

However, this Court granted certiorari because of the importance of the question in the administration of the act (383 U. S. 576) and reversed the judgment of the Court of Appeals, holding that "when the Commission issues a reparation order, not accompanied by a cease and desist order, a carrier may obtain review of the Commission's order only in the court where the shipper commences its enforcement action". The Court also stated that the first adjudication will generally be persuasive but, if not, conflicting decisions may be reviewed in this Court.

C. The Proceedings Below.

On or about August 22, 1962, almost a year after ACL filed its judicial review action in the Florida District Court

and only five days before the expiration of the one-year statute of limitations for the filing of an enforcement action, Thomson filed an enforcement action in the District Court for the Southern District of New York. By stipulation all proceedings therein were held in abeyance pending the decision by the Florida District Court in the action pending in that court.

On November 10, 1966, based on the aforesaid decision of this Court, ACL filed a cross-complaint in the District Court for the Southern District of New York under the provisions of 28 U.S.C.A. § 1336 and 1398, and Section 17(9) of the Interstate Commerce Act, 49 U.S.C.A. § 17(9), seeking to enjoin, set aside and annul the reports and orders of the Commission for substantially the same reasons alleged in the Florida District Court action. ACL's cross-complaint was consolidated with Thomson's enforcement action, and by stipulation it was agreed that the disposition of the enforcement action would be governed by the outcome of ACL's cross-complaint.

ACL filed a motion for summary judgment, as a result of which the District Court failed to make the same findings of fact and conclusions of law made by the Florida Court. The Court noted that the examiner found on the basis of evidence before him, including the record of compromise negotiations, that ACL's compromise offer was made and accepted in full settlement of the informal complaint, and concluded that the informal complaint had ceased to exist more than six months before any further action was taken by Thomson so that any claims that might have survived the compromise settlement were barred by the statute of limitations. The Court pointed out that neither Thomson nor the Commission point to any findings or basis, evidentiary or otherwise, supporting the Commission's reversal of the examiner and its conclusion that the informal complaint remained pending with respect to additional shipments.

The Court thereupon concluded "that the record fails to reveal substantial evidence supporting the Commission's reversal and contrary conclusions."

With respect to ACL's contentions concerning the effect of Rule 25(f), the Court concluded that the Commission did not err in rejecting ACL's contention that the several "reopenings" must be treated as a nullity, which would have the effect of barring the 1956 formal complaint, on the ground that the Commission's decision turns on its liberal rather than literal construction of the term "additional fact basis" in Rule 25(f), adding that it would be "unfair" to the complainant to hold that its claims were barred by the statute of limitations "because there was not a sufficient basis for reopening".

However, the District Court granted partial summary judgment on the ground that under a contract of sale to another company Thomson reserved only the right to assert freight charge claims with respect to shipments between January 1, 1948, and December 31, 1950, and also on the ground that the Commission had abused its discretion in awarding interest for the period prior to the filing of Formal Complaint No. 32065 on October 16, 1956. The Court modified the order of the Commission accordingly, and as so modified remanded the case to the Commission to determine whether the compromise agreement and payment of $13,171.98 by ACL constituted full settlement of the informal complaint.

Following receipt of the report of the Commission on remand, ACL filed a second motion for summary judgment seeking to enjoin, set aside and annul that report and order. The District Court denied the motion, concluding that for the "reasons" stated by the Commission, ACL's payment, notwithstanding their characterization of the compromise offer, did not discharge claims for reparation with respect to shipments other than those specified in the Commission's special docket award. The Court also pointed

to the Commission's statement that "carriers are not free to negotiate settlement on the basis of part payment of some claims, since such a procedure would preclude Commission determination of alleged *overcharges,* on undisclosed shipments and permit carriers to avoid their legal obligations with respect to tariffs due on the latter shipments simply by not advising the Commission of such claims." (Italics added)

D. The Second Circuit Opinion.

The Court of Appeals, merely referring to the initial decision of the District Court, stated that in an unreported decision, dated November 24, 1969, the District Court found that "there was substantial evidence in the record to support the supplemental position of the Commission". Noting that the Interstate Commerce Act invests the Commission with broad responsibility to police tariffs and rebates, the Court of Appeals concluded that the District Court found "substantial evidence" in the record to support the Commission's decision, and concluded that it could not say that conclusion was clearly erroneous within the meaning of Fed. R. Civ. p. 52(a).

Although conceding that ACL pointed to several instances when it asserted that Thomson's claim expired, the Court states "the most important contention" concerns the closing of Thomson's informal complaint in March, 1956, and the delay of more than six months in the filing of a formal complaint. Quoting Rule 25(f) the Court stated that the rule tolls the running of the two year statute of limitation provided in Section 16(3)(b) for complaints against carriers "based on overcharges". After referring to the District Court's refusal to treat the Commission's last reopening of the informal complaint as a nullity, thereby finding Thomson's formal complaint to have been filed within the six month period specified in Rule 25(f), the Court concluded that it could not conclude,

as a matter of law, that the Commission erred in reopening the informal complaint. The Court pointed out that the Commission had previously indicated a willingness to reopen cases on a "new fact basis" where the only new fact was a fresh argument by the complainant, and concluded that, as applied to this case, it could not conclude that the interpretation of the Commission's rule was arbitrary or clearly erroneous.

By order dated January 4, 1971, the Court of Appeals denied ACL's petition for a rehearing.

Reasons for Granting the Writ

A. The Case Presents an Important Question of Federal Law and One of First Impression Which Should Be Decided By This Court Because of Its Importance in the Administration of the Statute.

Rule 19(b) of the rules of this Court indicates that one ground for the granting of a writ of certiorari is whether a Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

In *ICC* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, this Court granted certiorari because of the importance of the question there involved in the administration of the statute. This case is the direct result of the decision of this Court in that case.

In *Brooklyn Bank* v. *O'Neil,* 324 U. S. 697, involving three cases, this Court granted certiorari because in one "the New York Court of Appeals decided a federal question of substance not heretofore determined by this Court", and in another because "the decision of the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court".

ACL respectfully submits that the issue involved in these proceedings, like those involved in the *Coast Line* and

Brooklyn Bank cases, presents an important question of federal law involved in the administration of the statute which has not been but should be settled by this Court. ACL respectfully submits that the reasons stated, including those that follow, fully justify the exercise of the Court's discretion to grant this petition.

B. Rule 25(f) of the Commission's General Rules of Practice, Like Section 16(3)(b) of the Statute, Is Jurisdictional and Should Be Strictly Construed and Complied With.

Section 16(3)(b) of the Act requires that complaints against carriers subject thereto which seek to recover damages "not based on overcharges" be filed within two years from the time the cause of action accrues *and not after,* subject to the provisions of a sub-division not here pertinent. Section 16(3)(g) of the Act expressly states that the term "overcharges" as used in that section shall be deemed to mean charges for transportation services "in excess of those applicbale thereto under the tariffs lawfully on file with the Commission". Section 17 of the Act deals with Commission procedures, and Paragraph 3 thereof authorizes the Commission from time to time to make or amend such "general rules" or orders as may be requisite for the order and regulation of proceedings before it. Under that authority the Commission publishes *General Rules of Practice Before the Commission,* including Rule 25 which provides for the filing of informal complaints and, more specifically, Paragraphs (e) and (f) thereof, which relate to "special docket proceedings" and the "six months rule", respectively.

In *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667, this Court held that under Section 16(3)(b) of the statute, "the lapse of time not only bars the remedy but destroys the liability". In *Louisville Cement Co.* v. *Int. Com. Comm.,* 246 U. S. 638, 643, this Court held that "the two-

year provision of the act is not a mere statute of limitation but is jurisdictional,—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion". In *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87, this Court stated that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

In *Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, this Court stated:

> "Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object not merely of regulating the relations of carrier and shipper *inter se*, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates. Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties' private interests or equities were involved, rigid adherence to the statutory scheme and standards is required. This 'obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.' *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97." (p. 361)

and

> "* * * the section's terms, * * *, their uniformity in all the limitations, its legislative history, and its setting in a statute designed certainly as much for the shipper's as for the carrier's benefit and in so many respects to avoid discriminatory practices and effects, all point to uniform construction of the limitations im-

> posed. And this, we think, is the effect of the decisions which have construed them or predecessor provisions." (p. 363)

and

> "The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished." (p. 364)

See also *Brooklyn Bank* v. *O'Neil, supra,* pages 705-706.

In *Mississippi River Fuel Corp.* v. *Federal Power Com'n,* 163 F. 2d 433, the Court of Appeals, District of Columbia, concluded:

> "When the Commission announces principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces." (p. 449)

Rule 25(f) of the Commission's *General Rules of Practice Before the Commission,* the so-called "six months rule", can hardly be called a "general" rule. It is not a hypertechnical rule or a mere matter of housekeeping. Contrary to the rules in question in *American Farm Lines* v. *Black Ball Freight Service,* 396 U. S. 884, which this Court stated "unlike some of our own, do not involve 'jurisdictional' problems", Rule 25(f) is jurisdictional and does involve "jurisdictional problems". Like Section 16(3)(b), it is crystal clear. It goes to the heart of the statute of limitations and the jurisdiction of the Commission. It specifically provides for the resubmission of an informal complaint *only* upon "an additional fact basis". It further provides that "if the matter is not so submitted, * * * complainant will be deemed to have abandoned the complaint". Not only Section 16(3)(b) but Rule 25(f) as well should be strictly construed. If its provi-

sions are not fully and strictly complied with, the Commission loses the jurisdiction it otherwise would have had. In this particular instance, the Commission blatantly disregarded its own rule, thus unlawfully extending the statutory period of limitation, and the decision of the Court below erred in concluding that the Commission's interpretation of its own rule is not arbitrary or erroneous.

C. The Circuit Court Erred as to Matters of Fact and of Law.

The decision below confirms the decision of the District Court in which in effect every finding of fact and conclusion of law was the exact opposite of those made by the Florida District Court (213 F. Supp. 199), and particularly those relating to the statute of limitations and Rule 25(f) of the Commission's Rules of Practice, incredible as that seems. The findings of fact and conclusions of law reached by the Florida District Court were not appealed from; the Commission's appeal was solely on the narrow issue of the Florida Court's jurisdiction, and, but for the decision of this Court in the *Atlantic Coast Line* case, 383 U. S. 576, would have been conclusive of the issue here involved.

1. *The Record Lacks Substantial Evidence to Support the Commission's Findings and Orders.*

The opinion of the Circuit Court stated:

> "Noting that the Interstate Commerce Act invests the Commission with a broad responsibility *to police tariffs and rebates,* the District Court found substantial evidence in the record to support the Commission's decision. We cannot say this conclusion is clearly erroneous within the meaning of Fed. R. Civ. P. 52(a)." (Italics added)

In its initial decision the District Court stated:

> "After giving due weight to the Commission's authority to reverse the Examiner, this Court is forced to

> conclude that the record fails *to reveal substantial evidence supporting the Commission's reversal and contrary conclusions.* It may be that the Commission's reversal is supported by evidence to the effect that the 1950 compromise was limited to specific shipments so that the claims relating to shipments subsequent to April 7, 1945, survived. If so, *such evidence is not in the record before us.*" (Italics added)

ACL respectfully submits that the unreported opinion referred to by the Circuit Court will be searched in vain for a finding that "*there was substantial evidence in the record to support the supplemented position of the Commission.** Furthermore, a most careful reading of the *Report and Order of the Commission on Reconsideration* fails to point to *any evidence in the record* to show that the District Court was in error in concluding in its initial decision that:

> "*The record fails to reveal substantial evidence* supporting the Commission's reversal and contrary conclusions." (Italics added)

All that the Commission did in its report on remand was to outline what the District Court referred to as "the reasons stated by the Commission".

It is well established that the function of a reviewing court is to hear and determine questions before it solely on the record made before the Commission. *Radio Corp. of America* v. *United States,* 95 F. Supp. 660. 669 (1950). Judicial review of an administrative order must be based *solely upon the record made before the agency. Judiciary and Judicial Procedure,* Section 2347, 28 U.S.C.A. § 2347; *Wilson & Co.* v. *United States,* 335 F. 2d 788, 799 (1964). As this Court stated in *Universal Camera Corp.* v. *Labor Bd.,* 340 U. S. 474, 477, substantial evidence is more than a

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* Italics added.

mere scintilla. It means such *relevant evidence* as a reasonable mind might accept as adequate to support a conclusion.

In the light of those principles, based upon the District Court's initial conclusion alone that "the record fails to reveal substantial evidence supporting the Commission's reversal and contrary conclusion", the District Court should have granted ACL's first motion for summary judgment and, like the Florida District Court, annulled and set aside the Commission orders. Having failed to do so, it was error for the Court of Appeals not to have done so.

Furthermore, in *Montana-Dakota Utilities Co.* v. *Federal Power Comm.*, 169 F. 2d 392 (1948), the Second Circuit itself stated:

> "the findings of an administrative agency are not to be tested by Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c, *United States* v. *Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525."

The simple fact of the matter is that the proceedings before the Commission did not involve in any way the Commission's "broad responsibility to police tariffs and rebates". The only issue sought to be reviewed was whether or not the rates and charges assailed in the complaint were barred from consideration by the Commission under the provisions of Section 16(3)(b) of the Act and Rule 25(f) of the Commission's own Rules of Practice.

ACL respectfully submits that it was error for the Court of Appeals not to have reversed the District Court.

2. *The Circuit Court Erred in Its Decision with Respect to the Statute of Limitations and Rule 25(f) of the Commission's Rules of Practice.*

In dealing with the statute of limitations and Rule 25(f) of the Commission's own Rules of Practice, the Second

Circuit opinion states that

> "Although ACL points to several instances when it asserts that Thomson's claim expired under the statute, the most important contention concerns the closing of Thomson's informal complaint in March, 1956, and the delay of more than six months until October 16, 1956, in the filing of a formal complaint."

ACL emphatically disagrees with that statement by the Court. They consider prior "closings" and "reopenings" by the Commission's staff equally important and worthy of consideration not accorded by the Circuit Court,—for example, the "closing" on June 26, 1952, and the "reopening" on December 24, 1952. Dealing with ACL's attack upon the latter reopening of the informal complaint because there was no "additional fact basis" for such action as required by Rule 25(f), the Court states that the "additional fact basis" upon which the informal complaint was reopened was that Thomson had filed a formal complaint (Docket No. 31124), seeking reparation on shipments to five destinations "previously involved in the informal complaint". The Court thereupon concluded:

> "Pendency of a formal complaint constitutes a sufficient basis to reopen because resolution of the issues in a formal proceeding will usually result in settlement of an informal proceeding involving substantially similar issues."

citing two Commission decisions decided in 1932 and 1937 *prior* to the addition of the phrase "on an additional fact basis" in 1942. Both cases cited involved *different* complainants, not the same complainant as in this case. Moreover, in *Brandeis, Goldschmidt & Co., Inc.* v. *The Baltimore and Ohio Railroad Company, et al.,* Docket No. 34436, decided August 27, 1965, (mimeographed and not reported) *after* the addition of the phrase "on an additional fact

basis'' in 1942, the Commission stated that ''complainant's reference to such pending proceeding did not present any 'additional fact basis' as required by Rule 1.25(f)''.

The simple fact of the matter is that a single informal complaint, raising but one issue, has been permitted by the Commission and the lower Courts to be used as the basis for three separate proceedings, a ''negotiated'' settlement between ACL and Thomson in 1950, a formal complaint filed in 1952 (Docket No. 31124), and another formal complaint filed in 1956, the one here under review. Contrary to the conclusion of the lower Courts, the Commission's staff clearly abused its descretion in determining that there ''was a reasonable possibility that further attempt at informal adjustment may be successful''. After its special docket ''negotiated'' settlement in 1950, ACL steadfastly refused to agree to any other informal adjustment.

After quoting Rule 25(f) of the Commission's Rules of Practice, the Circuit Court *erroneously* states that the rule tolls the running of the two year statute of limitations provided by 49 U.S.C.A. § 16(3)(b) for complaints against carriers *based on overcharges.* Section 16(3)(b) expressly relates to complaints against carriers *not based on overcharges.*

Pointing out that the District Court refused to treat the Commission's reopening from April 4th to April 19th as a nullity, and thereby found Thomson's formal complaint to have been filed within the six month period specified by the Commission's Rule 25(f), the Circuit Court stated

> ''We cannot conclude, as a matter of law, that the Commision erred in reopening the informal complaint.''

apparently because

> ''The purpose of the informal docket is *to facilitate negotiated settlements between shippers and carriers* at less expense than formal litigation.'' (Italics added)

It need only be pointed out that in order to dispose of the informal complaint ACL *had* "negotiated" a settlement with Thomson that resulted in the 1950 special docket award, and that it had thereafter steadfastly refused to make any further informal "settlement" of the same informal complaint.

The Second Circuit opinion then states:

> "While ACL contends 'there is not the slightest doubt as to the meaning of the words "on an additional fact basis," ' the words must be construed in the context of a regulatory scheme which seeks to avoid the heavy burden of litigation where there is a reasonable possibility of negotiated settlement. The Commission has previously indicated a willingness to reopen cases on a 'new fact basis' where the only new fact is a fresh argument by the complainant. See *Southland Company* v. *Southern Ry. Co.*, 300 I.C.C. 9 (Dec. 2, 1957)."

It thereupon stated that "As applied to this case, we cannot conclude that this interpretation of the Commission's rule is arbitrary or clearly erroneous.[2]"

Contrary to the statement just quoted, the "new fact basis" on which the Commission reopened the *Southland* case was not "a fresh argument". The report of the Commission in that proceeding clearly states:

> "This informal complaint was closed on May 20, 1955, but was subsequently reopened on October 14, 1955, when resubmitted by letter of September 5, 1955, *on an additional fact basis.* The informal docket was closed on November 4, 1955, as not being susceptible of informal adjustment. The defendants argue that the complainant's letter of September 9, 1955, did not contain sufficient facts to justify reopening the informal complaint for further consideration. The facts bearing upon this contention are discussed below."

* * * * * *

By letter of September 9, 1955, the complainant called attention to *factual and tariff differences* between the instant situation and that in *A. E West Petroleum Co.*, v. *Atchison, T. & S. F. Ry. Co., supra,* and asked that the matter be resubmitted to the defendants. Thereupon, the informal complaint was reopened and the *new* statements of the complainant were referred to the defendants. By letter of October 26, 1955, they declined further to consider the informal complaint. By notice mailed on November 4, 1955, the complaint was declined by us as not susceptible of informal adjustment. Upon a subsequent request that the complaint be reopened on the informal docket, the complainant was informed that the complaint remained declined as of November 4, 1955." (Italics added)

Footnote 2 of the Second Circuit Court's opinion purports to state the standard to be applied in reviewing an administrative agency's interpretation of its own rule, citing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945) and *Western Union Telegraph Co.* v. *United States,* 217 F. 2d 579 (2d Cir. 1954).

What this Court stated in the *Bowles* case was

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation *if the meaning of the words used is in doubt.* The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight *unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter.*" (pp. 413-414) (italics added)

Plainer language could not have been used. Furthermore, this Court's statement that the *legality of the result* reached by that process is the crux of the matter in this instance. The requirment for strict construction and compliance with Rule 25(f) can hardly be any more "unfair" than it would be for the Commission to hold, as it has done on a number of occasions, that a formal complaint filed one day after the expiration of the two-year statutory period was barred by the statute of limitations.

In *Western Union Telegraph Company* v. *United States,* 217 F. 2d 579 (1954), the second case cited as authority in the footnote, this very court stated:

> "The Commission's interpretation of a Formula adopted and approved by it after careful consideration—like other administrative regulations of a responsible governmental agency—is entitled to great weight *if not so unnatural or unreasonable as to ensnare and entrap* those governed by it." (p. 581) (Italics added)

In this instance there is no *formula,* only a *rule* affecting the statute of limitations specified in the statute, so clearly stated that there is not the slightest doubt as to the meaning of the words "on an additional fact basis".

In *Minneapolis R. R.* v. *Peoria Ry.,* 270 U. S. 580, 585, this Court stated that the opinion of a *commissioner* that the order there in issue was in full force despite the dismissal of the complaint was "without legal significance". In *Thomson* v. *Texas Mexican R. Co.,* 328 U. S. 134, 136, this Court stated that "the Secretary of the Commission was without authority to bind the Commission in the matter" there under consideration. In *Western Maryland Ry. Co.* v. *Commodity Credit Corp.,* 154 F. Supp. 508, that Court stated

> "Although even an informal opinion of an experienced I.C.C. official must carry some weight, it can-

not overcome the plain language of the orders and tariffs."

In the light of those statements by the courts, the several informal views expressed by the Commission's Secretary or its staff were "without legal significance", and certainly an arbitrary interpretation of Rule 25(f) could not operate to remove the bar of the statute of limitations or modify the provisions of the rule itself.

ACL respectfully submits that the Circuit Court was in error in not concluding that the Commission's staff was in error in reopening the informal complaint on one or more occasions, and that the Commission's interpretation of Rule 25(f) was arbitrary and clearly erroneous.

D. The Decision of the Court of Appeals, Upholding the Decision of the Commission with Respect to the Legal Effect of Rule 25(f), Is in Direct Conflict with Prior Commission Decisions.

Long before the words "on an additional fact basis" were added to Rule 25(f), effective on September 15, 1942, the Commission had as a matter of principle declined to reopen informal complaints where no new or additional facts were presented.

In *Domestic Coke Corp.* v. *Baltimore & O. R. Co.*, 168 I.C.C. 53, decided September 22, 1930, a case which involved former Rule III(g), the predecessor of Rule 25(f), the Commission stated:

> "It remains to determine whether complainant *abandoned* its informal complaint. * * * *Our secretary's letter of May 24, 1926, although written under a misapprehension of the requirements of Rule III(c), was a definite denial of the claim as filed.* Because of the lack therein of what were then regarded as essential elements of an informal complaint, the denial could not have been more definite. It is immaterial, as we

view it, that if the informal rejection had been justified the informal complaint would have been barred before the letter of May 24, 1926, was written. *That fact made it no less the duty of complainant to submit its claim within the six months' period specified in our Rules of Practice. Its failure to do so was an abandonment of the complaint within the meaning of those rules.* * * * *In other words, even though our secretary may have based the dismissal upon what we now find to be an erroneous conclusion concerning Rule III (c), nevertheless it was a dismissal, and cast the burden upon complainant to take additional action before the expiration of six months.*

We are not unmindful of the fact that on May 28, 1929, our secretary had informed the complainant that it had six months from February 2, 1929, within which to file a formal complaint. But at that stage of the correspondence the claim was either abandoned or was not abandoned. If it were abandoned the statement of our secretary could not operate to remove the bar. The claim was already extinguished.

We find that the formal complaint here considered was filed more than six months after the informal complaint had been 'denied on the informal docket,' and that the informal complaint had therefore been abandoned." (pp. 55-56) (Italics added.)

In *Carpenter Paper Co.* v. *Chicago & A. R. Co.*, 171 I.C.C. 783, decided January 16, 1931, the Commission found that complaint barred because a letter from the complainant requesting reopening "was not supported by any new matter which would warrant reopening", that the case was not resubmitted informally, and that "the failure to resubmit the claim within six months was an abandonment of the claim within the meaning of Rule III(g), regardless of whether or not complainant intended to abandon it", citing *Domestic Coke* v. *Baltimore & O. R. Co., supra.*

In *South Chester Tube Co.* v. *Reading Co.*, 181 I.C.C. 613, decided January 28, 1932, the Commission stated that the complainant, "without furnishing new facts in support thereof, requested that the informal proceedings there involved be reopened", and that request was denied, citing the *Carpenter* case.

As a result of administrative studies undertaken by a committee of the Commission's staff, a draft of proposed rules of practice was formulated in January, 1942. In that draft former Rule III(g) became Rule 25(d), and old Rule III(g) was copied verbatim except that the phrase "on an additional fact basis" was added. A footnote on page 22 of the draft explained what the new phrase meant.

> "*Rule 25(d).* The text is from present rule III (g). In the second sentence there has been inserted, after 'resubmitted', the phrase 'on an additional fact basis'. This is an attempt to give effect to the interpretation of rule III(g) as made in *Carpenter Paper Co.* v. *Chicago & A. R. Co.*, 171 I.C.C. 783, and *South Chester Tube Co.* v. *Reading Co.*, 181 I.C.C. 613."

The revised rule was approved on July 31, 1942, and became effective September 15, 1942.

The added phrase "on an additional fact basis" was clearly nothing more than a codification of the interpretation given former Rule III(g) in previous decisions of the Commission, and the draft proposing its addition specifically cited two of those discussed above. It is thus apparent that the words "on an additional fact basis" mean and were intended to mean on the basis of additional factual rather than argumentative matter. That such a meaning or construction of the revised rule was not used by the staff of the Commission in reopening Informal Complaint No. 174417 is undeniable.

In *Mente & Co., Inc.* v. *Central of Georgia Ry. Co.*, 296 I.C.C. 21, decided May 24, 1955, the Commission stated

that the resubmission of the informal complaint there relied upon "contained no new or additional information" which justified the reopening of the complaint, and found that formal complaint barred by the statute of limitations on the ground that the formal complaint was filed more than six months after due notice was given of the closing of the informal proceeding.

In *Atlantic Creosoting Co., Inc.* v. *Southern Ry Co.*, 323 I.C.C. 533, decided November 19, 1964, the Commission referred to Rule 25(f), stating that it merely provides means whereby the two year statutory period in Section 16(3)(b) is tolled pending informal consideration of a complaint. After stating that the procedural question raised by the complainant was whether certain letters there referred to constituted "resubmission on an additional-fact basis as required by rule 1.25(f)", the Commission concluded that the letters contained no *new or additional facts* but were merely repetitive of the original submission and thus did not constitute a resubmission. The Commission then said:

> "The Commission found under similar circumstances in *LeTourneau-Westinghouse Co.* v. *Southern Ry. Co.*, 299 I.C.C. 17, that a formal complaint filed more than six months after denial of the informal complaint was barred. A similar conclusion is warranted here." (p. 535)

In *Brandeis, Goldschmidt & Co., Inc.* v. *The Baltimore and Ohio Railroad Company, et al., supra,* the Commission stated:

> "* * * the full text of complainant's letter of September 23, 1963, upon which complainant relies is set forth in the appendix. *Even under a liberal construction of the phrase 'additional fact basis'* this letter fails to indicate any factual information relating to the shipments which are the subject of the informal

complaint. It merely referred to *a pending proceeding filed by a different complainant* against some of the defendants herein involving movement of the same commodity, but from different origins and a different destination than involved herein. While a somewhat similar issue is involved in the referred to proceeding, it is not substantially different from issues involved in the numerous cases relied upon by the complainant in the informal complaint before it was closed by the Secretary's letters of March 29, and April 23, 1963. *We agree with the hearing examiner that complainant's reference to such pending proceeding did not present any 'additional fact basis' as required by Rule 1.25(f).*

"The complainant's representative also argues that *he should have been able to rely on the letter from the chief of the Informal Cases Branch that the proceeding was reopened;* and that he would have had time to file a formal complaint had he been advised that his request had been denied. However, his request was received only 3 days before the expiration of the 6-month time period with respect to 118 of the 127 shipments. Whether prompt denial of the request would have afforded complainant sufficient time to file a formal complaint with respect to the 118 shipments, while doubtful, is immaterial. The reopening was a nullity because it was without legal foundation as complainant's request did not comply with Commission's Rule 1.25(f)." (pp. 5-6) (italics added)

The Commission thereupon found that

"the formal complaint under consideration was not filed within the time provided by Section 16(3)(b) of the Act and Rule 1.25(f) of the Commission's General Rules of Practice, and thus is barred from our consideration."

E. The Decision Below Permits the Exercise of Discrimination, Preference and Prejudice by the Commission and Its Staff in the Application of Rule 25(f).

The undeniable effect of the decision by the Second Circuit is to permit the Commission or its staff in the exercise of "its discretion" or "liberal" construction or "interpretation" of Rule 25(f) to discriminate, prefer or prejudice individual complainants before it. In the present instance, as previously cited decisions of the Commission indicate, the Commission has, with the approval of the Second Circuit, discriminated in favor of and preferred *Thomson* by its "liberal" interpretation of Rule 25(f), and prejudiced *Domestic Coke, Carpenter Paper, South Chester Tube Co., Mente, Atlantic Creosoting Co.,* and *Brandeis, Goldschmidt & Co.,* by its strict or literal construction of the same rule, as heretofore shown by the discussion of those cases.

In *Union Pacific R. Co.* v. *U. S.,* 313 U. S. 450, this Court stated with respect to the Interstate Commerce Act:

> "In fact, favoritism which destroys equality between shippers, however brought about, is not tolerated." (p. 462)

In *New York* v. *United States,* 331 U. S. 284, this Court stated:

> "The principal evil at which the Interstate Commerce act was aimed was discrimination in its various manifestations."

In *United States* v. *B. & O. R. Co.,* 333 U. S. 169, this Court stated:

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all

types, *New York* v. *United States*, 331 U. S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616."

If the stringent principles cited above by this Court require the Commission to apply them in its administration of the Act to those regulated thereby, it certainly must follow that they require the Commission, as the administrator and regulator under the Act, to refrain from observing or permitting any discrimination, preference or prejudice by its staff or itself in the administration of the statute and its own General Rules of Practice Before the Commission.

F. The appropriateness of certiorari.

Prior to the Circuit Court's opinion, affirming the decisions of the District Court, the phrase "on an additional fact basis" in Rule 25(f) of the Commission's Rules of Practice was construed and interpreted by the Commission and its staff to mean exactly what it said, and strict compliance with its provisions was necessary to prevent the running of the statute of limitations of the Act. ACL believes that the impact of the lower courts' acceptance of the Commission's "liberal" rather than "literal" construction or interpretation of its own rule in this instance will be so far reaching in its ultimate effect on the statute of limitations, is so completely irreconcilable with this Court's findings of years standing that the two year provision of the Act is not a mere statute of limitations but is jurisdictional, and that the lapse of time not only bars the remedy but destroys the liability, and that the issue involved is among the most important issues involving the Interstate Commerce Act, including its statute of limitations, presented to this Court for determination. By refusing to require strict application of the provisions of Rule 25(f) with respect to the reopening of informal com-

plaints, ACL firmly believes that the decisions of the lower courts will make a mockery of and for all practical purposes nullify the statute of limitations in Section 16(3)(b) of the statute.

CONCLUSION

For the foregoing reasons, ACL prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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New York, N. Y. 10017,
Attorney for Petitioners.

April 1, 1971

§ 16. Orders of Commission and Enforcement Thereof.

§ 16, par. (3). Limitation of actions.

(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

§ 17. Commission procedure; delegation of duties; rehearings.

Conduct of proceedings; seal; oaths; quorum; rules

(3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof,

which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

General Rules of Practice.

Rule 25. Informal complaints seeking damages.

(e) **Special-docket proceedings.** Where the act provides for an award of damages for violation thereof and a carrier is willing to pay them, or to waive collection of undercharges, petition for appropriate authority should be filed by the carrier on the special docket in the form prescribed by the Commission. If the petition is granted an appropriate order will be entered. Such petition, when not filed in connection with an informal complaint pending before the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the petition. If a carrier is unable to file such petition within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper or consignee and sufficient to stay the operation of the statute.

(f) **Six months' rule.** If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional fact basis.

Such filing or resubmission will be deemed to relate back to the date of the original filing, but reference to that date and the Commission's file number must be made in such resubmission or in the formal complaint filed. If the matter is not so resubmitted, or included in a formal complaint, as provided in this rule, complainant will be deemed to have abandoned the complaint and no complaint seeking damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period.

No. 32065

THOMSON PHOSPHATE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Decided February 10, 1958

Rates on ground phosphate rock, in carloads, from Prairie, Fla., to destinations in Illinois found to have been unjust and unreasonable. Reparation awarded.

Abner Pollack and *Harry Teichner* for complainant.

Urchie B. Ellis and *J. Edgar McDonald* for defendants.

REPORT OF THE COMMISSION.

DIVISION 2, COMMISSIONERS WINCHELL, MURPHY, AND MINOR

BY DIVISION 2:

The modified procedure was followed, and oral hearing was held for cross-examination of the complainant's witnesses. Exceptions to the report proposed by the examiner and replies thereto were filed by the parties. The conclusions herein differ from those recommended by the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on October 16, 1956, complainant, a corporation, alleges that the rates charged on numerous shipments of ground phosphate rock, in carloads, from Prairie, Fla., to destinations in Illinois from April 10, 1945, to December 31, 1950, were unjust and unreasonable. Reparation only is sought. During the period in-

volved the complainant was an Illinois corporation dealing in ground phosphate rock used in agriculture, with its principal office in Chicago, Ill. The corporation was dissolved in September 1951, but use of its name as a complainant in this proceeding was permissible under Illinois statutes.

The defendants contend that no reparation can be awarded in this proceeding because all of these shipments moved more than 5 years before this complaint was filed. Section 16 (3) (b) of the Interstate Commerce Act requires that complaints against carriers subject to part I of the act for the recovery of damages not based on overcharges must be filed within 2 years from the time the cause of action accrues, and not after. The disposition of this contention depends upon the effect to be given to an informal complaint No. 174417, filed with the Commission by this complainant on May 20, 1946, alleging that rates on ground phosphate rock from Prairie "to all stations in the State of Illinois during the past 2 years" were unreasonable. This complaint was transmitted to the Atlantic Coast Line Railroad Company, hereinafter called the Atlantic Coast Line, the originating carrier.

In a letter dated December 4, 1947, the complainant advised the Commission that its informal complaint "is for reparation on all shipments described herein to all destinations in Illinois during the statutory period, as well as the pendency of this proceeding." A copy of this letter was sent to the Atlantic Coast Line. That carrier wrote the Commission on December 17, 1947, stating that it was willing to consider—

> the question of payment of reparation on all of the shipments involved in this informal complaint upon which the statute of limitations has not run, with a view of making reparation by observance of the basis fixed by the Interstate Commerrce Commission for reparation purposes in the Diamond Fertilizer Com-

pany case * * *. [*Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co.*, 256 I.C.C. 75.]

Rates were prescribed therein for application on phosphate rock from Florida points, including Prairie, on the bases of 85 percent of the fertilizer scale approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, as to past shipments, on which reparation was awarded, and 75 percent thereof for the future. Among the destinations involved in *Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co.*, 256 I.C.C. 75, were East St. Louis, Ill., and Indianapolis and Hartsdale, Ind.

Subsequently a special-docket application No. 218792, was filed by the defendants, and, upon consideration thereof, an order was entered on September 19, 1950, directing payment of $13,012.52 to the complainant as reparation on account of unreasonable charges on shipments moved during the period from November 15, 1943, to April 7, 1945. In its letter of December 7, 1950, to the Atlantic Coast Line, acknowledging payment of this reparation, the complainant called attention to the fact that its informal complaint also embraced shipments which had moved after April 7, 1945, and requested reparation thereon. The question whether the complainant was entitled to reparation of these later shipments was the subject of further correspondence between the parties and our secretary, who wrote to the complainant on June 26, 1952, that no further action in the premises would be taken informally, and that if it desired to pursue the matter further, a formal complaint would be necessary.

The complainant filed such complaint No. 31124 on October 14, 1952, assailing rates on ground phosphate rock from Prairie to Bethany, Malta, Paris, Rossville, and Wapella, Ill., which resulted in decisions by division 3, *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 291 I.C.C. 1 and 293 I.C.C. 369, awarding reparation. In reply to the complainant's request that the informal complaint be held

in abeyance pending a decision in No. 31124, the Commission's secretary stated in his reply of December 24, 1952, that "in accordance with your request, the informal proceeding will be considered reopened." The defendants there contended, as they do herein, that the informal complaint No. 174417, was completely disposed of by the order in special docket No. 218792 on September 19, 1950, and that the filing of the formal complaint in No. 31124 more than 2 years later was too late. Division 3, however, concluded that the filing was timely, pointing out that as to shipments after April 7, 1945, "the informal proceeding was closed on June 26, 1952, without adjustment."

The reparation awarded in No. 31124 was paid on October 5, 1955, by a check enclosed in a letter from the Atlantic Coast Line to the complainant's counsel, stating that it represented "payment in full of all matters involved in Informal Complaint 174417 and I.C.C. Docket No. 31124 growing out of that informal complaint." In acknowledging payment on October 14, 1955, the complainant again referred to the reopening of the informal complaint on December 24, 1957, and requested "adjustment on the shipments to the remaining Illinois destinations through special docket channels * * *." Further fruitless correspondence followed, in the course of which the Atlantic Coast Line asserted that the informal complaint had been terminated by the Commission's letter of June 26, 1952.

Some time later, in a letter dated March 29, 1956, the secretary of the Commission again wrote to the complainant's counsel that the matter involved in the informal complaint "is one not susceptible of adjustment on the Commission's informal docket." However, upon receipt of a letter from the complainant's counsel requesting reconsideration the chief of our section of informal cases wrote to the Atlantic Coast Line on April 4, 1956, stating that the informal docket "is hereby reopened and submitted to you for your further consideration." After additional exchange of correspondence the secretary of the Commission wrote

to the complainant's counsel on April 19, 1956, stating that "we are again declining the complaint."

Rule 1.25 (f) of our General Rules of Practice provides, among other things, that when an informal complaint seeking damages cannot be disposed of informally the parties will be so notified in writing, and the matter in such complaint will not be reconsidered, unless, within 6 months of such notice, a formal complaint as to such matter is filed or it is informally resubmitted on an additional fact basis. The filing of the instant complaint on October 16, 1956, was seemingly in conformance with the "six months' rule" if the secretary's letter of April 19, 1956, is regarded as the final declination of the informal complaint. The defendants urge that the informal complaint should be regarded as having been closed either by the secretary's letter of June 26, 1952, or that of March 29, 1956, and that no additional facts were later presented by the complainant after either of those dates to support the purported reopenings of December 24, 1952, or April 4, 1956.

In support of this argument the defendants rely on the decision of division 2 in *LeTourneau-Westinghouse Co.* v. *Southern Ry. Co.*, 299 I.C.C. 17, which dealt with a factual situation somewhat resembling that now before us. On reconsideration, however, 299 I.C.C. 780, the Commission reversed the finding of the division that the complaint was barred. The Commission said, at pages 780 and 781:

> The division concluded that by repeated notices the complainant was fully apprised that the matter was not susceptible of informal adjustment, and that it should have filed the formal complaint within 6 months of the first notice, whereas it failed to file such a complaint within 6 months of the final notice on February 18, 1954. The division further recognized an exchange of correspondence between the parties in May 1955, and a subsequent notice from our secretary, dated July 21, 1955, that the complaint was declined, but

decided that the complainant had been on definite notice prior thereto.

We are in complete agreement with the division's observation that the complainant had definite notice that the matter was not susceptible of informal adjustment before the secretary's letter of July 21, 1955. However, we deem important the statements in the letter that the contents of the complainant's latest letters had been given consideration, that the complaint was again declined, and that the complainant's attention was directed to rule 25 (f) of the General Rules of Practice. Thus, the letter implied that the complainant still had 6 months within which to file a formal complaint. In these circumstances, we are of the view that the matter is not barred, and we shall proceed to a consideration of the merits.

The secretary's letter of April 19, 1956, in the instant proceeding was drawn along similar lines. It indicated that the matter was one not susceptible of informal adjustment, and directed the complainant's attention to the appropriate provisions of rule 1.25 (f) of the General Rules of Practice. We consider this letter to have been the final declination and its date to have marked the beginning of the 6 months' period. Accordingly, the complaint is not barred.

The defendants urge also that the complainant is not a proper party to receive a possible award of reparation in this proceeding on two grounds:

(1) The complainant bought the rock which comprised these shipments from the International Minerals and Chemical Corporation, hereinafter referred to as International, which prepaid the freight charges but debited them specifically in the complainant's account. The complainant's prices to the consignees, its customers, who were chiefly farmers, were on a delivered basis. Freight costs among other elements were considered in quoting those prices.

Although the freight charges were initially paid by International, they were paid and borne by the complainant within the usual meaning of that term.

(2) In April 1951 International acquired all of the outstanding capital stock of the complainant, which was dissolved in September of that year. As a result of these transactions most of the complainant's assets were taken over by International, but it appears that the claim which is the subject of this complaint was excepted from the transfer, contrary to the assertion of the defendants. This conclusion is substantiated by the fact that the reparation awarded in No. 31124 based on shipments which moved on and between July 5, 1945, and January 11, 1949, was paid to the complainant in October 1955 without objection on the part of International.

Another contention of the defendants is that the filing of this complaint more than 5 years after the complainant was dissolved was in contravention of an Illinois statute reading, in part, as follows:

> The dissolution of a corporation * * * shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

The instant complaint may be considered as one phase of a proceeding which was commenced by the filing of informal complaint No. 174417 before the dissolution of the complainant corporation. The prosecution of the formal complaint in the name of the complainant was therefore not inconsistent with this statute. See *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 128.

The defendants further urge that the assailed rates have not been shown to be unjust or unreasonable in that the material facts, including the nature of the movements, consignees, destinations, loading, frequency, and the actual commodity and its utilization, are much different from those involved in the decisions cited by complainant as precedents.

The shipments consisted of 636 carloads, which moved to more than 100 destinations throughout Illinois, of which Harrisburg, Carlinville, Champaign, Kankakee, and Rochelle are geographically representative. The average carloading was about 84,000 pounds, substantially the same as that in *Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co., supra.* There, and in *Armour & Co.* v. *Aberdeen & R. R. Co.,* 268 I.C.C. 502, the shipments were to chemical companies at a limited number of points, which manufactured superphosphate or heavy chemicals. Nevertheless in No. 31124 division 3 was guided by those decisions in considering the rates on shipments of ground phosphate rock to farmers at widely scattered points. Its decision included the following:

> On average loads for distances of from 1,251 to 1,046 miles, the car-mile yields range from 23.9 to 26.3 cents from the applicable rates, and would range from 22.6 to 24 cents from the rates sought.

Here it is shown that on average loads to representative points for distances between 1,018 and 1,164 miles, the car-mile earnings ranged from 23.6 to 26.9 cents under the rates in effect on June 30, 1946, compared with a range from 22.9 to 24.2 cents under the basis sought. The circumstances considered by division 3 in reaching its decisions in No. 31124 are indistinguishable from those shown by this record.

We find that the rates assailed were unjust and unreasonable to the extent that they exceeded 75 percent

of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories, supra,* extended to include distances from Bartow, Fla., and increased as subsequently authorized for application on phosphate rock when the shipments moved.

We further find that the complainant made the shipments as described and paid and bore the charges thereon at rates herein found to have been unjust and unreasonable, and was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been just and reasonable, and is entitled to reparation, with interest. The complainant should comply with rule 1.100 of the General Rules of Practice.

No. 32065

THOMSON PHOSPHATE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Decided September 28, 1960

Upon further hearing, amount of reparation due complainant under findings in the prior report, 303 I.C.C. 25, on carload shipments of ground phosphate rock from Prairie, Fla., to destinations in Illinois, determined and ordered paid.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON FURTHER HEARING.

DIVISION 3, COMMISSIONERS HUTCHINSON, WALRATH, AND WEBB

BY DIVISION 3:

Exceptions to the report and order on further hearing recommended by the examiner were filed by the defendants, and the complainant replied. At the request of the defendants, the parties were heard in oral argument following the hearing before the examiner, in lieu of filing briefs. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the prior report, 303 I.C.C. 25, decided February 10, 1958, under the modified procedure, in which oral hearing was held for cross-examination of the complainant's wit-

nesses, division 2 found that the rates[1] charged on numerous shipments of ground phosphate rock, in carloads, moved on and between April 11, 1945, and October 21, 1950, from Prairie, Fla., to destinations in Illinois, were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories,* 232 I.C.C. 301, extended to include distances from Bartow, Fla., and increased as subsequently authorized for application on phosphate rock when the shipments moved. Accordingly, the complainant was found to be entitled to reparation, with interest, on these shipments, in the amount of the difference between the charges paid and those found to have been just and reasonable, and was directed to comply with rule 1.100 of the General Rules of Practice. A petition by the defendants for reconsideration of the findings in the prior report, to which reply was made by the complainant, was denied by the Commission on July 23, 1958.

In due course, statements were filed with the defendants by the complainant containing details of the shipments on which reparation is claimed, in compliance with the requirements of rule 1.100. Thereafter, the defendants declined to certify any of the statements, and returned them to the complainant. Upon request of the complainant, the proceeding was reopened for further hearing, solely for the purpose of determining the amount of reparation due under the findings in the prior report.

After a hearing, a recommended report and order were issued, wherein the examiner found that the complainant was entitled to reparation in the total amount of $8,889.76, with interest, on the shipments of record, listed in appendix A to this report. The defendants were allowed 30 days, however, after service of the examiner's report, in which to make a check as to the accuracy of the amounts of reparation therein specified. Subsequently, a petition for

[1] Rates are stated per ton of 2,240 pounds.

leave to file petition for reconsideration of the findings in the prior report, filed by the defendants, was denied by the Commission on June 23, 1960. Thus, the issue herein is limited solely to a determination of the amount of reparation due the complainant under the findings in the prior report.

The defendants, aside from excepting to the amount of reparation recommended by the examiner, also protest the finding in the prior report and the examiner's recommendation on further hearing that interest be allowed in connection therewith. It is their view that interest is awarded only as a means of compensating complainants for the period of time in which they have been "deprived of the use of their money," and that the complainant here has been deprived thereof, if at all, only because of its own delay in formally processing its reparation claims. In essence, the defendants accuse the complainant of being guilty of laches. The Commission's denial of the defendants' petition for reconsideration of the prior report precludes our further consideration of that matter in this proceeding.

Specifically, the defendants contend that the examiner erred in finding the complainant entitled to reparation in the total amount of $8,889.76, plus interest, and urge that if reparation is to be awarded herein, it should not exceed $8,258.75, without interest. In support thereof, they offer certain alleged corrections in the amounts of reparation to be awarded on some 35 shipments, which would result in a reduction of $125.02 in the total amount of reparation indicated in appendix A to the examiner's recommended report on further hearing. For example, on a shipment of 112,800 pounds of ground phosphate rock shipped to Andres, Ill., in car number NYC 101560 on April 13, 1945, charges of $370.13 were collected based on a rate of 735 cents. In appendix A to his report, the examiner determined that charges of $360.56 should have been assessed,

based on a rate of 716 cents, and that reparation should be awarded in the amount of the difference, or $9.57. In their exceptions, the defendants contend that the proper rate under the "75-percent" scale was 725 cents, which would result in charges on this shipment of $365.09, with resulting reparation in the amount of $5.04. The evidence of record indicates that the "75-percent" scale projected to 1,175 miles, the distance to Andres, produced a rate of 716 cents at the time of movement. No justification appears for this and like changes suggested by the defendants. In these circumstances, the defendants' proposed corrections must be rejected.

It is further contended by the defendants on exceptions that the examiner erred in not rejecting reparation claims with respects to 57 shipments, listed in appendix B hereto, which would have effected a further reduction of $505.99 in the total amount of reparation. It appears that these particular shipments had been diverted to destinations other than those originally specified, and that the complainant was unaware of that fact. The defendants urge that this establishes that the complainant had neither paid nor borne the freight charges on these shipments, and is not entitled to reparation thereon. As previously stated, the issue before us is the determination of the total amount of reparation to be awarded. Division 2 found, in the prior report, that the complainant paid and bore the charges on all the shipments herein, and no reason appears for questioning that finding. Accordingly, the defendants' contention that the examiner erred in recommending reparation on these shipments has no support of record. As pointed out by the complainant, the distances to the actual destinations of these shipments instanced by the defendants are shorter than those to the original destinations designated. Thus, the reparation award recommended, as to these shipments, is at least no less than that warranted by the actual distances.

Upon further hearing, we find that the complainant is entitled to reparation from the defendants in the accompanying order in the amounts set opposite their respective names in appendix C hereto, aggregating $8,889.76, with interest. An appropriate order will be entered.

COMMISSIONER WALRATH, dissenting:

While I agree with the findings of the majority with respect to the limited issues on further hearing, I believe that the complaint is barred by section 16(3) of the act.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

No. 4771-Civ.-J.

United States District Court
M. D. Florida,
Jacksonville Division.

Jan. 9, 1963.

Urchie B. Ellis, Richmond, Va., J. Edgar McDonald, New York City, and Phil C. Beverly, Jacksonville, Fla., for plaintiff Railroads.

Leonard S. Goodman and Isaac K. Hay, Washington, D. C., for defendant, Interstate Commerce Commission.

McRAE, District Judge.

FINDINGS OF FACT

1. This action, filed September 6, 1961, seeks review of a reparation order of the Interstate Commerce Commission in Docket 32065, Thomson Phosphate Co. v. Atlantic Coast Line Railroad Company et al., 303 I.C.C. 25, 311 I.C.C. 315. The complaint before the Interstate Commerce Commission was filed on October 16, 1956. It alleged that the rates assessed on ground phosphate rock were unjust and unreasonable to the extent that they exceeded 75% of certain rates on fertilizer materials.

The shipments of phosphate rock (about 636 in number) were from Prairie, Florida, to more than 100 destinations

in Illinois during the period April 1945 through December 1950, as tabulated in Appendix A, 311 I.C.C. 315, 318.

The amount involved is $8,889.76 with interest at 4% per annum from the dates the charges were collected. All of the shipments were made and the charges were paid btween April 10, 1945, and December 31, 1950; the accrued interest and principal accordingly may reach $15,000.

The Railroads contended that the assessed rates were not unreasonable, and further contended:

(a) That Thomson was barred by the 2-year statute of limitations in § 16(3) of the Interstate Commerce Act, 49 U.S.C. § 16(3), because the shipments all moved prior to December 31, 1950, and the complaint was not filed until October 16, 1956;

(b) That Thomson and the Commission had failed to observe the requirements of Commission Rule of Practice 25(f) and thus failed to stay the Statute of Limitations (Rule 25 is attached hereto as an appendix);

(c) That the Informal Complaint 174417, filed March 20, 1946, which Thomson and the Commission relied upon to stay the Statute of Limitations [§ 16(3)(b)], did not satisfy the Commission Rule of Practice 25(b) in that it did not include the proper details regarding shipments;

(d) That the Formal Complaint, filed October 16, 1956, did not satisfy Commission Rule of Practice 29 and thus did not stay the Statute of Limitations;

(e) That likewise it did not satisfy Rule 17(b) regarding signing and verification by an executive officer;

(f) That Thomson had sold its interest in all claims on shipments moved prior to January 1, 1948, and thus had no right to claim reparations;

(g) That Thomson did not pay or bear the freight charges and thus was not entitled to recover in any event;

(h) That Thomson, a corporation, was dissolved in September 1951 and, accordingly, could not therefore file

an action or institute formal proceedings before the Interstate Commerce Commission in October 1956;

(i) That it was error to award reparations at all; and further that it was error to award interest for all this period of time in which a complainant sat back for over 10 years as to some shipments before taking formal action.

2. The matter was handled in 1957 by the Commission, by affidavits, under Modified Procedure. Hearing for cross examination of complainant's witnesses took place May 29, 1957.

Thereafter, the Examiner of the Interstate Commerce Commission issued his report in August 1957 and found that the claims were barred by the Statute of Limitations.

On February 10, 1958, a Division of the Commission issued a report (303 I.C.C. 25) ruling against the Railroads on all points discussed and completely disregarding others. A petition for reconsideration was filed by the Railroads and was denied by Commission order of July 23, 1958.

The Railroads refused to certify the amount of reparations due, and the matter was referred to an Examiner for a further hearing which took place April 27, 1959. After further proceedings, a second report of a Division of the Commission was issued September 28, 1960 (311 I.C.C. 315). This report was adverse to the Railroads, but of the three Commissioners, Commissioner Walrath dissented and stated that the claims were barred by § 16(3). A petition for reconsideration was filed and denied by order of May 23, 1961. Thus, at no time did the full Interstate Commerce Commission ever actually review this case.

Oral argument before the Commission was requested in three separate pleadings and in each instance was denied.

[1] 3. Although the Railroads had the alternative of forcing Thomson to file suit to enforce the ICC order, it was felt that the procedural issue involved in the case justified taking the initiative in order to be sure of Court review of the alleged errors. Complaint was filed with this

Court August 28, 1961. The ICC filed answer January 5, 1962. The United States answered on January 12, 1962, indicating that it would not participate in the defense.

4. The Interstate Commerce Commission filed a motion to dismiss, contending that the Railroad plaintiffs had no right to seek this review but had to wait for Thomson to file a court action to enforce the Commission order of reparation. This issue was separately briefed and argued in May 1962, and the motion was denied by order of May 15, 1962, in which it was held that the action was proper and that this Court had jurisdiction.

5. An Informal Complaint No. 174417 was filed by Thomson on March 20, 1946, pursuant to Interstate Commerce Commission Rule 25, It sought reparations on shipments "during the past two years" and did not specify a single shipment by any identifiable reference.

6. Thomson and the ICC rely on this Informal Complaint as having stayed the 2-year Statute of Limitations contained in § 16(3) (b) of the Interstate Commerce Act, 49 U.S.C. § 16(3), so as to permit the filing of Docket 32065 here under review.

7. On December 4, 1947, over twenty months later, Thomson advised the ICC that Informal Complaint No. 174417 was to cover shipments "during the pendency of this proceeding".

8. On December 17, 1947, the Railroads offered to pay reparations in Informal Complaint No. 174417 "on all shipments involved in this informal complaint upon which the statute of limitations has not run".

9. This proposal was accepted by Thomson, without qualification, in January 1948, and a Special Docket application, No. 218792, was prepared and filed with the ICC.

The ICC issued an order September 19, 1950, authorizing the payment to Thomson of $13,071.98, which was paid to Thomson November 17, 1950. This was pursuant to ICC Rule 25(e).

10. Thomson received and cashed the check for $13,071.98 and then on December 7, 1950, asked for additional reparations on a different basis. The Railroads repeatedly refused payment and stated that they had paid and had settled Informal Complaint 174417.

11. On July 20, 1951, however, the ICC advised that in its "informal view" Informal Complaint 174417 was still open for further claims. The Railroads thereafter took the position that they would pay no further claims; and after being requested by the Railroads several times, the ICC finally advised Thomson on June 26, 1952, that it would have to comply with Rule 25(f) if it desired to pursue the matter.

12. The ICC Hearing Examiner in his report of August 1957 found Docket 32065 barred by the payment to Thomson of $13,071.98 in 1950, saying:

> "A study of the situation on September 19, 1950, leads only to the conclusion that the informal complaint had been satisfied and that no further complaint was pending.
>
> "* * * Rule 25(f) provides for notice to the parties only when an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant. None of those conditions prevailed here. There is no rule which in any way tolls the statute when as in this instance an informal complaint is closed by special docket approval after a compromise has been reached. The Commission is empowered to make such general rules as may be requisite for the order and regulation of proceedings before

it and conduct its proceedings to best conduce to the proper dispatch of business and to the ends of justice, but the limitation provided by section 16(3) is jurisdictional and cannot be waived by the Commission or its staff. [A.J.] Phillips [Co.] v. Grand Trunk [Western] Ry., 236 U. S. 662 [35 S. Ct. 444, 59 L. Ed. 774]. Nor do the ends of justice appear to require waiver of established principles of contract law that an offer in compromise when accepted results in a contract binding upon both parties, or that one cannot accept money offered in full settlement of a disputed claim and reject the conditions on which it is offered. Yazoo & M. V. R. Co. v. Webb [5 Cir.], 64 Fed. (2d) 902."

13. Thomson filed a formal complaint in the fall of 1952 on some shipments allegedly also covered by Informal Complaint 174417 and, after a nominally contested proceeding before the ICC, was paid $1,463.80 in 1955 by check reading "payment in full of all matters in Informal Complaint 174417". The Railroads were justified in considering that this had entirely closed out the matter.

[2] 14. Nevertheless, by letter of December 19, 1952, Thomson requested reopening of Informal Complaint 174417. This letter was not supplied to the Railroads until March 21, 1956. It contained no additional facts relating to Informal Complaint 174417, yet the ICC perfunctorily reopened the Informal Complaint by letter of December 24, 1952, stating that Informal Complaint 174414 (sic) was reopened "as originally filed".

15. The effect of this letter, if the obvious error in docket number is disregarded, can at most be to reopen Informal Complaint 174417 on shipments only during the two years prior to March 14, 1946, which is the way the Informal Complaint was originally filed.

16. Again Thomson revived the matter by correspondence to the Railroads and the ICC in October 1955, after being paid the $1,463.80. After many denials of responsibility by the Railroads, the ICC finally on March 29, 1956, advised Thomson:

> "* * * we are again declining the complaint and directing your attention to the provisions of Rule 25(f) of our Rules of Practice."

17. On March 31, 1956, Thomson again wrote the ICC without any additional facts as required by Rule 25(f), and it requested reopening of Informal Complaint 174417; this was perfunctorily done by a subordinate Commission staff member. Again the Railroads said the matter was closed, yet the Commission staff member chose to argue the matter before finally on April 19, 1956, "again declining" the Informal Complaint and referring to Rule 25(f).

18. Docket 32065 was filed October 16, 1956, within six months after the letter of April 19, 1956, but more than six months after the letter of March 29, 1956. Thus Informal Complaint 174417 had to remain alive until April 19, 1956, if any claims survived the 2-year limitation period of 49 U.S.C. § 16(3)(b).

19. The complaint in Docket 32065 was one page in length which, even though filed years after the shipments moved, merely referred to Informal Complaint 174417 and failed to specify a single shipment; however, it took the ICC eight pages of small type to tabulate the shipments in its report at 311 I.C.C. 315, 318-27.

20. The complaint in 1956 was not signed and verified by an executive officer of Thomson as required by ICC Rule 17(b).

21. The complainant, Thomson Phosphate Co., an Illinois corporation, was sold to International Minerals and Chemicals Corp. in 1951, and was legally dissolved in 1951; nevertheless this complaint was not filed until 1956. Illinois Law (Smith-Hurd Ill. Anno. Stat. ch. 32, § 157.94) requires that an "action or other proceeding" be commenced in two years.

22. The contract of sale of Thomson to I. M. & C. specifically reserved to Thomson the freight charge claims on shipments only between January 1, 1948, and December 31, 1950, yet Thomson seeks in 32065 to recover on shipments back to 1945. The ICC failed to apply the language of its letter of December 24, 1952, reopening Informal Complaint 174417 "as originally filed" which only covered shipments prior to March 14, 1946.

23. Thomson was merely a broker of phosphate rock in Illinois. It never did own, mine, manufacture, store, or even touch the product. Thomson first made sales and then ordered shipment by I. M. & C., which actually paid the Railroads' freight charges. Thomson billed the receiver with all costs, specifically itemizing freight charges; it thereafter collected and paid I. M. & C. If Thomson recovers here, it will have collected part of the freight charges twice, and it will have a windfall over ten years after the corporation was dissolved.

24. The shipments here went to many different locations (over 100) in Illinois to farmers for direct application to the soil as fertilizer, whereas the material in the cases relied on by Thomson went to chemical companies at a few points.

25. The record shows no plausible or defensible reason for Thomson handling its claims in such a piecemeal, dilatory way, that has resulted in this litigation being dragged out for more than a decade.

Conclusions of Law

1. This action arises under, the United States is made a defendant herein in accordance with, and the jurisdiction of this court rests upon 5 U.S.C. § 1009, 28 U.S.C. §§ 1336, 1398 and 2201, and § 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and F. R. Civ. P. 57.

[3] 2. This action is properly reviewable by a one-judge District Court instead of a three-judge Court because it involves an order for the payment of money. Pennsylvania R. R. v. United States, 363 U. S. 202, 205, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

[4] 3. Venue exists under 28 U.S.C. § 1398 because Plaintiff Atlantic Coast Line Railroad Company is a corporation under the laws of Virginia, having its principal office at Jacksonville, Florida.

[5] 4. Section 16(3) (b) of the Interstate Commerce Act [49 U.S.C. § 16(3) (b)] destroys the right as well as the remedy, and it must be strictly construed. It is jurisdictional and limits the power of the Interstate Commerce Commission to consider a complaint. [See annotations under 49 U.S.C. § 16(3)]. Accordingly, the Commission Rule 25 must also be strictly construed in this case.

[6] 5. The payment of $13,071.98 to Thomson in November 1950, pursuant to order of the ICC in Special Docket 218792, terminated Informal Complaint 174417 as provided in ICC Rule 25(e). Therefore, it was not necessary that any further action be taken, or advice be given, by the ICC to terminate the Informal Complaint under Rule 25(f).

Established principles of contract law regarding compromise and settlement also require the conclusion that

Informal Complaint 174417 was closed out. Yazoo & M. V. R. R. v. Webb, 5 Cir., 64 F. 2d 902.

[7] Accordingly, Docket 32065, filed in 1956 and covering shipments in 1950 and prior years, was barred by 49 U.S.C. § 16(3) (b), and Informal Complaint 174417 cannot be relied upon to stay the running of the 2-year limitation period.

[8] 6. The letter of December 19, 1952, from Thomson to the ICC did not contain the "additional fact basis" required by ICC Rule 25(f), and the letter of the Commission Acting Secretary dated December 24, 1952, improperly reopened Informal Complaint 174417. See Mente & Co., Inc. v. C. of Ga. Ry., 296 I.C.C. 21; Domestic Coke Corp., v. B. & O., 168 I.C.C. 53; Carpenter Paper Co. v. C. & A. R. Co., 171 I.C.C. 783; South Chester Tube Co. v. Reading Co., 181 I.C.C. 613. Thus, the present Docket 32065 is also barred because Informal Complaint 174417 could not have been reopened by the ICC under Rule 25(f).

[9] 7. Thomson is likewise barred by its acceptance of the check in 1955 representing "payment in full of all matters in Informal Complaint 174417". This terminated and compromised whatever might then have been left of Informal Complaint 174417, and it could no longer stay the Statute of Limitations contained in 49 U.S.C. § 16(3) (b).

[10] 8. Additionally, Docket 32065 is barred because it was not filed within six months of the ICC letter of March 29, 1956, which declined Informal Complaint 174417. The subsequent reopening and declination on April 19, 1956, did not comply with ICC Rule 25(f) because no additional facts were submitted.

[11] 9. Although the decision of the Court is not necessarily based upon this conclusion, it is nevetheless the

opinion of the Court that the complaint in Docket 32065 did not stop the running of the statute of limitations because it did not comply with ICC Rules of Practice 17(b), 25(b) and 29, which require the signing and verification by an executive officer of Thomson and that formal complaints supply the data required of informal complaints by Rule 25(b). From this conclusion, it would follow that all shipments covered by 32065 are now barred.

[12] 10. Likewise, it appears to the Court that the Informal Complaint 174417, filed in 1946, fails to satisfy Rule 25(b), and thus all shipments allegedly covered thereby are barred by 49 U.S.C. § 16(3). See Thurston Chemical Co. v. A.C.L., 291 I.C.C. 357, 358; N. A. Smelting Co. v. B&O, 309 I.C.C. 619; American Stores v. A. C. & Y., 310 I.C.C. 127; Texas Gas Trans. Corp. v. A. & S. R., 310 I.C.C. 207, 208.

11. In view of the above conclusions of law which have been reached by the Court, it is unnecessary to consider:

(a) Whether or not Thomson could bring a suit in 1956, since it was an Illinois corporation dissolved in 1951.

(b) Whether or not Thomson's sale to I. M. & C. affected its rights to reparations.

(c) The reasonableness *vel non* of the rates involved.

(d) All other questions raised by the record and not specifically disposed of herein.

12. The reports of the Interstate Commerce Commission in Docket 32065, Thomson Phosphate Co. v. A.C.L., 303 I.C.C. 25, 311 I.C.C. 315, and the related orders of September 28, 1960 and July 13, 1961 are unlawful. A judgment should accordingly be entered enjoining, setting aside, and annulling said reports and orders and holding that the complaint in 32065 was barred by the statute of limitations, 49 U.S.C. § 16(3) (b).

13. Judgment will be entered in accordance with the present Findings of Fact and Conclusions of Law.

THOMSON PHOSPHATE COMPANY,

Plaintiff,

v.

ATLANTIC COAST LINE R. Co. et al.,

Defendants.

ATLANTIC COAST LINE R. Co. et al.,

Cross-Plaintiffs,

v.

UNITED STATES of America and Interstate Commerce Commission,

Cross-Defendants.

No. 62 Civ. 2911.

United States District Court
S. D. New York.

April 1, 1968.

Harry Teichner, Brooklyn, N. Y., for plaintiff.

J. Edgar McDonald, New York City, for defendants and cross-plaintiffs.

Robert M. Morgenthau, U. S. Atty. for Southern Dist. of New York, for United States, by Michael Hess, Asst. U. S. Atty., New York City.

Robert W. Ginnane Gen. Counsel, for Interstate Commerce Commission, by Nahum Litt, Atty., Interstate Commerce Commission, Washington, D. C.

MANSFIELD, D.J.

Defendants ("Railroads" herein) move for summary judgment setting aside a reparation order of the Inter-

state Commerce Commission, Dkt. No. 32065, *Thomson Phosphate Co.* v. *Atlantic Coast Line R.R.*, 303 I.C.C. 25 (Div. 2, 1958), 311 I.C.C. 315 (Div. 3, 1960), awarding plaintiff Thomson Phosphate Co. ("Thomson" herein) $8,889.76 with interest on account of unjust and unreasonable rates assessed on about 636 shipments of ground phosphate rock moved to more than 100 destinations in Illinois during the period from April, 1945 to December, 1950.

This action began on August 22, 1962, as a suit by Thomson against the Railroads to enforce the Commission's reparation order. By stipulation it was held in abeyance pending the determination of an action brought by the Railroads against the Government and the Commission on September 6, 1961 in the District Court for the Middle District of Florida to review the Commission's order. A decision by that court in favor of the Railroads upholding their defense of statute of limitations, 213 F. Supp. 199 (1963), appealed solely on the ground of lack of jurisdiction, 334 F. 2d 46 (5th Cir. 1964), was ultimately reversed on this ground by the Supreme Court, which held that the Railroads could seek review in this Court where Thomson's enforcement action was pending. 383 U. S. 576 (1966). On May 21, 1967 a separate cross-complaint filed in this Court by the Railroads was consolidated with the enforcement action brought by Thomson. 41 F.R.D. 522 (1967). By stipulation the disposition of Thomson's enforcement action will be governed by the outcome of the Railroads' cross-petition for review of the Commission's order.

The Railroads urge on this motion for summary judgment that the Commission erred in not finding Thomson's claims barred by the two-year statute of limitations in § 16(3) of the Interstate Commerce Act, 49 U.S.C.A.

§ 16(3) (1964 ed.)* because various defects in informal complaint procedure under I.C.C. Rule 25, 49 C.F.R. § 1.25, render inapplicable subdivision (f) of that Rule (Rule 25(f)), which provides that upon the termination of an informal proceeding, a complainant has six months within which either to file a formal complaint or resubmit an informal complaint on "an additional fact basis" and that such filing or resubmission will be deemed to relate back to the date of original filing.**

The Commission opposes on the grounds that its interpretation of its Rule 25, being neither arbitrary nor clearly erroneous, is controlling, see *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413-14 (1945), and that its findings and conclusions are supported by substantial evidence.

On May 20, 1946, Thomson filed Informal Complaint 174417 ("Informal Complaint" herein) alleging that rates on ground phosphate rock from Prairie, Florida to all stations in Illinois during the previous two years were unjust and unreasonable. The purpose of the Commission's informal docket procedure is to reduce the burden of litigation involved in proceedings on the formal docket by providing for the negotiation and settlement of claims under Commission auspices. An informal complaint is processed by means of correspondence among the parties and the

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*"(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph."

**"(f) *Six month's rule.* If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional fact basis.

"Such filing or resubmission will be deemed to relate back to the date of the original filing. . . ."

Commission staff, which can be handled by a shipper or carrier without the expense involved in a formal presentation to the Commission. The participation of the Commission staff in this process encourages the parties to make a diligent attempt to achieve a settlement, and agreement is reached in most cases.

By letter of December 4, 1947, Thomson took the position that the Informal Complaint was also to cover shipments during "the pendency of this proceeding." This position does not appear to have been controverted by the Railroads or questioned by the Commission.

On December 17, 1947, Atlantic Coast Line R.R. ("ACL" herein), the originating carrier, offered on behalf of the Railroads to pay reparations "on all shipments involved in this informal complaint [No. 174417] upon which the statute of limitations has not run." The Commission, thereupon issued an order on September 19, 1950, Special Docket 218792 ("1950 Special Docket award" herein), directing the Railroads to pay Thomson $13,012.51 as reparations for unreasonable charges on 185 shipments moved *during the period up to April 7, 1945.* Payment was made on November 17, 1950.

On December 7, 1950, Thomson acknowledged receipt of the reparations payment and requested reparations pursuant to its Informal Complaint for shipments which had moved *after* April 7, 1945. After further correspondence between the Secretary of the Commission and the parties, the Secretary, on June 26, 1952, advised Thomson that the Informal Complaint was closed as not susceptible of informal adjustment.

On October 14, 1952, within six months after the closing of the Informal Complaint, Thomson filed a formal complaint, No. 31124 ("1952 Formal Complaint" herein) for reparations on shipments to five destinations previously covered by the Informal Complaint and on December 19, 1952 requested the Commission to reopen the Informal Complaint with respect to remaining destinations, to be

held in abeyance pending disposition of the formal proceeding. By letter of December 24, 1952, this request was granted and "Informal Complaint 174414 [sic]" was reopened "as originally filed."

On the 1952 Formal Complaint, Thomson was awarded reparations of $1,463.80, 291 I.C.C. 1, 293 I.C.C. 369, which was paid by the Railroads on October 3, 1955, accompanied by the statement that this was "payment in full of all matters involved in Informal Complaint 174417 and ICC Docket No. 31124 growing out of that informal complaint." In acknowledging receipt of payment, Thomson called attention to the pendency of the Informal Complaint with respect to shipments to remaining Illinois destinations and requested settlement of these claims.

On March 29, 1956, after further informal procedure proved unproductive, the Secretary of the Commission advised Thomson that the Informal Complaint was again declined. On March 31, 1956, Thomson requested reconsideration and on April 4, 1956, the Informal Complaint was again reopened. After further correspondence, it was again closed, for the last time, on April 19, 1956.

On October 16, less than six months after this last closing, but more than six months after the closing of March 29, 1956, Thomson filed Formal Complaint No. 32065 ("1956 Formal Complaint" herein) which is here in issue, covering shipments to the remaining Illinois destinations during the period from April 10, 1945 to December 31, 1950. On February 10, 1958, the Commission, Division 2, reversed a recommendation of the Hearing Examiner that the statute of limitations barred Thomson's claims and found the rates unjust and unreasonable, 303 I.C.C. 25. Further proceedings ensued to determine the amount of the award and on September 28, 1960, the Commission, Division 2, Commissioner Walrath dissenting on the ground of the statute of limitations, followed the recommendation of the Hearing Examiner that Thomson be awarded $8,889.76 with interest. 311 I.C.C. 315.

The Railroads' cross-action to review the Commission's award of reparations on the 1956 Formal Complaint relies principally on the ground that the filing of that formal complaint was barred by the statute of limitations despite the six-month extension provided by Rule 25(f). The Railroads argue that Thomson's claims were not preserved by the pendency of the Informal Complaint because that complaint

> (1) was defective so that its filing on May 20, 1946 did not toll the running of the statute of limitations;
>
> (2) was extinguished by the 1950 Special Docket award and the failure of Thomson to take further action within six months as required by Rule 25(f);
>
> (3) was not properly reopened on December 24, 1952 so that the extension provided by Rule 25(f) expired six months after the Informal Complaint was closed on June 26, 1952;
>
> (4) was extinguished on October 3, 1955 when the Railroads paid the award in the 1952 Formal Complaint and no further action was taken by Thomson within six months as required by Rule 25(f);
>
> (5) was not properly reopened on April 4, 1956 so that the extension provided by Rule 25(f) expired six months after the Informal Complaint was closed on March 29, 1956.

With regard to their statute of limitations defense, the Railroads also contend that the 1956 Formal Complaint was defective and therefore did not stop the running of the statute of limitations when it was filed on October 16, 1956.

The Railroads also maintain that Thomson lacked the capacity to collect reparations, that the rates charged were not unjust and unreasonable, and that the award of interest was improper.

I. *The Statute of Limitations*

The Railroads contend that Thomson's claims, which are with respect to shipments between April 7, 1945 and December 31, 1950, are barred by the two-year statute of limitations because those claims were not properly asserted on May 20, 1946 by the Informal Complaint. In particular, the Railroads argue that the Informal Complaint did not describe the shipments in issue with "reasonable definiteness" as required by I.C.C. Rule 25(b).* The opinion of the Commission did not discuss this argument. However, the Court finds it without merit.

In *Louisville & N.R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217 (1925) (Brandeis, J.), the Supreme Court said:

> "no statute or rule imposes upon the Commission procedure so exacting as to make fatal mere failure to present within the period of limitation the detail of a statement which under the procedure prevailing in courts of law may ordinarily be supplied by amendment or a bill of particulars. . . . [T]he contention of [the Railroad] would involve the adoption of a pro-

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* "(b) *Content.* An informal complaint seeking damages, when permitted under the act, must be filed within the statutory period, and should contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint should state: (1) that complainant makes claim for damages, (2) the name of each individual claimant seeking damages, (3) the names of defendants against which claim is made, (4) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne, (5) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (6) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, if known, the routes of movement, and (7) the nature and amount of the injury sustained by each claimant."

> cedure contrary to the long established practice of the Commission and would defeat the convenient and effective administration of the Act." (269 U. S. at 227)

See also *Arcadia Mills* v. *Carolina, C. & O. Ry.*, 293 Fed. 639 (D.S.C. 1922). Furthermore,

> "an informal complaint which informs a defendant of the nature of a claim, though couched in general terms and lacking specific details, is sufficient to stop the running of the statute, and we have so found in many cases." *Vernon Lumber Corp.* v. *Atchison, T. & S. F. Ry.*, 279 I.C.C. 253, 262 (1950) (dissenting opinion).

See also *Cicardi Bros. Fruit & Produce Co.* v. *Atlantic Coast Line R.R.*, 227 I.C.C. 67 (1938).

Thomson's Informal Complaint described the shipments involved with "reasonable definiteness" as required by Rule 25(b). It demanded damages on "carload shipments of ground phosphate rock from Prairie (Mulberry), Fla., to all stations in the State of Illinois during the past two years." A representative list of destinations and routes of movement was attached. The rate charged was specified together with a statement of its contention as to why that rate was unreasonable and what the basis for a proper rate was.

The Railroads suggest that the shipments involved were not specified by date and that the destination points were not individually listed. However, Rule 25(b)(5) permits description by reference to a period of time as an alternative to specific dates, in accordance with which the Informal Complaint referred to shipments "during the past two years" and Thomson's letter of December 4, 1947 referred to subsequent shipments during "the pendency of this proceeding." As for the destination points, Rule 25(b)(6) does not require these to be individually listed where they are numerous, as was the case here, and ac-

cordingly the Informal Complaint was accompanied by a representative list of destinations and routes of movement. Therefore, the Court concludes that the Informal Complaint was sufficiently definite, as required by Rule 25(b), to prevent the running of the statute of limitations after May 20, 1946 when it was filed.

The Railroads' next contention is that the Informal Complaint was extinguished by the 1950 Special Docket award and the failure of Thomson to take further action within six months as required by Rule 25(f). It was on this ground that the Hearing Examiner upheld the statute of limitations defense, saying

> "the informal complaint, No. 174417, filed by complainant on May 20, 1946, became the subject of a compromise offer as made by defendants on December 19, 1947, and . . . such offer was accepted by complainant, without reservations, on January 20, 1948. The contract resulting was, in effect, approved by the Commission when it issued its order in Special Docket No. 218792 on September 19, 1950."

The Examiner then applied

> "established principles of contract law that an offer in compromise when accepted results in a contract binding upon both parties, [and] that one cannot accept money offered in full settlement of a disputed claim and reject the conditions on which it is offered."

The Examiner thus found, apparently on the basis of evidence before him, including the record of compromise negotiations, that the Railroads' compromise offer was made and accepted in full settlement of all claims that could be the subject of the Informal Complaint, including those with respect to shipments made during the pendency of the proceedings, and that the "settlement in full" took the form of an award referring specifically to 185 pre-April 1945 shipments. Accordingly, he concluded that the

Informal Complaint had ceased to exist more than six months before any further action was taken by Thomson and therefore any claims of Thomson that may have survived the offer and compromise approved by the Commission in the 1950 Special Docket award were barred by the statute of limitations.

The Examiner's findings and conclusions must be taken into account in determining whether the Commission's decision is supported by substantial evidence, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 493 (1951), although the power of decision belongs to the Commission and, if supported by substantial evidence on the record as a whole, its decision may not be upset merely because it is in conflict with the Examiner's report, especially where, as here, demeanor evidence is not particularly significant. See *N.L.R.B.* v. *St. John's Associates, Inc.*, —— F. 2d —— (2d Cir. March 25, 1968) (Dkt. No. 31753).

Neither Thomson nor the Commission point to any findings or basis, evidentiary or otherwise, supporting the Commission's reversal of the Examiner and its conclusion that the Informal Complaint remained pending with respect to shipments post-dating April 7, 1945. Although Division 3, in its decision disposing of the 1952 Formal Complaint referred to the Railroads' contention that the Informal Complaint was "completely disposed of by the order [1950 Special Docket award] on September 19, 1950," the Examiner observed:

> "the report therein apparently fails to consider what effect, if any, the compromise agreement and special docket approval may have had upon the previously pending informal complaint."

After giving due weight to the Commission's authority to reverse the Examiner, this Court is forced to conclude that the record fails to reveal substantial evidence supporting the Commission's reversal and contrary conclusions. It may be that the Commission's reversal is sup-

ported by evidence to the effect that the 1950 compromise was limited to specific shipments so that the claims relating to shipments subsequent to April 7, 1945 survived. If so, such evidence is not in the record before us. In view of the Examiner's contrary findings, the Court would be justified in inferring that the parties followed a procedure not unusual in the settlement of ordinary litigated claims, i.e., to enter into a compromise of all outstanding claims but provide that the settlement on the record would take the form of an order directing payment with respect to certain specific claims. In view of the fact that the informal procedure in effect results in the Commission's putting its imprimatur upon the form presented by the parties, the Examiner's finding that there was a full and complete settlement of all claims cannot be disregarded. Accordingly, in the absence of any findings by the Commission, the matter must be remanded to the Commission for determination of this basic issue.

The Railroads further contend that even if the Informal Complaint was not extinguished by the 1950 Special Docket award, Thomson's claims were nevertheless barred by the statute of limitations because the Informal Complaint was closed on June 26, 1952 and not properly reopened within six months by the Commission's letter of December 24, 1952. In support of this contention they first argue that as to shipments subsequent to May 20, 1946, when the Informal Complaint was filed, Thomson's claims are barred because the Commission letter of December 24, 1952 reopened the Informal Complaint "as originally filed," and as filed on May 20, 1946 the Informal Complaint expressly referred only to shipments within two years prior to that date. However, the Informal Complaint "as originally filed" did not necessarily exclude shipments subsequent to May 20, 1946 because an award of reparations for shipments during the pendency of reparations proceedings may be made even in the absence of a specific request for such relief. See *Louisville & N.R.R.* v. *Sloss-*

Sheffield Steel & Iron Co., supra; Buckerfield's Ltd. v. *Atchison, T. & S. F. Ry.*, 283 I.C.C. 614 (1951). Furthermore, Thomson's letter of December 4, 1947 made it clear that the Informal Complaint covered shipments during "the pendency of this proceeding," and the Railroad made no objection at that time to the inclusion of such shipments. Therefore, the phrase "as originally filed" in the reopening letter of 1952 was not intended to distinguish between shipments before and after May 20, 1946.

The Railroads' principal argument in support of their attack upon the 1952 reopening of the Informal Complaint is that there was no "additional fact basis" for such action as required by Rule 25(f). However, the "additional fact basis" upon which the Informal Complaint was reopened, after being closed on June 26, 1952 as not susceptible of informal adjustment, was that shortly thereafter, on October 14, 1952, Thomson had filed the 1952 Formal Complaint seeking reparations on shipments to five destinations previously involved in the Informal Complaint. Thomson requested reopening of the Informal Complaint with respect to shipments to remaining destinations so that those claims could be held in abeyance pending adjudication of the 1952 Formal Complaint which involved substantially similar shipments from the identical shipping point to contiguous destinations in the same state. Pendency of a formal complaint constitutes a sufficient basis to reopen because resolution of the issues in a formal proceeding will usually result in settlement of an informal proceeding involving substantially similar issues, cf. *Charlottesville Woolen Mills* v. *Chesapeake & O. Ry.*, 222 I.C.C. 99 (1937); *NuShine Co.* v. *Baltimore & O.R.R. Co.*, 185 I.C.C. 608 (1932). However, the practice of holding some claims in abeyance pending the disposition of others has the disadvantage, so well illustrated by this case, that if the formal adjudication does not lead to settlement of the remaining informal claims, the adjudication of those remaining claims is unduly delayed.

The Railroads' next contention is that even if the reopening of the Informal Complaint on December 24, 1952 was proper, Thomson's claims held in abeyance in that proceeding were extinguished by the payment of $1,463.80 by the Railroads to Thomson accompanied by a letter representing that this was "payment in full of all matters involved in Informal Complaint 174417 and I.C.C. Docket No. 31124 growing out of that informal complaint." However, Thomson did not accept this payment as extinguishing the Informal Complaint but, in acknowledging receipt of payment, requested settlement of its claims with respect to shipments to remaining destinations under the Informal Complaint (from which the five destinations involved in the 1952 Formal Complaint had been excepted when the Informal Complaint was reopened). Therefore, the Railroads' argument that the payment of the sum awarded in the 1952 Formal Complaint extinguished Thomson's claims under the Informal Complaint (assuming it had not been settled in 1950) is without merit.

The Railroads' principal contention on this motion is that regardless of the disposition of the above issues, Thomson's claims were barred by the statute of limitations because after the refusal of the Railroads to settle the Informal Complaint, it was closed on March 29, 1956, and the 1956 Formal Complaint was not filed until October 16, 1956, more than six months later. Following the closing of March 29, however, the Informal Complaint was reopened from April 4 to April 19, 1956, when it was again closed, less than six months before the filing of the 1956 Formal Complaint. The Railroads argue that the reopening of the Informal Complaint on April 4 was improper because it was not supported by "an additional fact basis" as required by Rule 25(f) and therefore must be disregarded in determining whether Thomson's claims are barred.

The Informal Complaint had been closed on March 29, 1956 after letters dated March 13 and 26 from the Railroads (J. G. Middleton, ACL's general freight agent) in-

dicated that in reliance on the statute of limitations and Rule 25(f) they were refusing to settle. The basis for reopening the Informal Complaint on April 4 was a letter from Thomson's representative (Abner Pollack) to the Secretary of the Commission (Harold D. McCoy), requesting reconsideration and reopening. This letter noted that the Commission had apparently overlooked a letter from the Railroads dated October 27, 1955 indicating that they were reconsidering their refusal to settle, and urged the Commission to attempt to persuade the Railroads that their reliance on the statute of limitations and Rule 25(f) was misplaced. It noted that formal proceedings should be unnecessary since the merits of Thomson's claims had virtually been decided in the 1952 Formal Complaint.

The Railroads' response to the reopening was a letter of April 6 (Urchie B. Ellis of ACL's Law Department) detailing their view that the Informal Complaint had not been properly reopened on December 24, 1952. A Commission letter of April 11 followed, expressing the "informal views" that the Informal Complaint was still alive. On April 16, the Railroads refused to reconsider and accordingly the Commission wrote Thomson on April 19 that the Informal Complaint was closed.

In these circumstances, the Court cannot conclude that the Commission erred in rejecting the Railroads' contention that the reopening from April 4 to April 19 must be treated as a nullity, which would have the effect of barring the 1956 Formal Complaint, filed less than six months thereafter, particularly since the Commission's decision turns on its liberal rather than literal construction of the term "additional fact basis" in Rule 25(f), an interpretation of its own Rule which is entitled to great weight in the absence of a showing of arbitrariness or abuse of discretion. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413-14 (1945). The purpose of the requirement in Rule 25(f) that "an additional fact basis" be presented in a request to reopen is to indicate to the Commission staff that the

heavy burden of litigation may be avoided because there is a reasonable possibility that informal adjustment will be more successful than earlier efforts. Furthermore, after the Commission staff reopens, the complainant relies on that reopening to extend the statute of limitations under Rule 25(f). If the proceeding is later closed without compromise, the Commission expressly directs the complainant's attention again to Rule 25(f), as was done here on April 19, 1956, thereby implying that the complainant has six months thereafter within which to file a formal complaint. *LeTourneau-Westinghouse Co.* v. *Southern Ry.*, 299 I.C.C. 780 (1957); see also *Purex Corp.* v. *Pennsylvania R.R.*, 277 I.C.C. 753 (1950); *A. S. Nowlin & Co.* v. *Chesapeake & O. Ry.*, 213 I.C.C. 101, 121 (1935). Therefore unless the Commission staff has abused its discretion in determining that there is a reasonable possibility that a further attempt at informal adjustment may be successful, it would be unfair to the complainant to hold that its claims were barred by the statute of limitations because there was not a sufficient basis for reopening.

No such abuse of discretion appears here. Pollack's letter presented to the Commission's staff the peculiar circumstances of this case, that the merits of Thomson's claims had already been adjudicated in the 1952 Formal Complaint, that the Railroads were relying solely on the statute of limitations, that the closing of March 29 had been based on the mere assertion by the Railroads of this defense without any supporting details, and that the Commission's letter of March 29 had implied that it was the Commission's informal view that the Railroads' reliance on the statute of limitations was misplaced. Cf. *Southland Co.* v. *Southern Ry.*, 300 I.C.C. 9 (1957). This presentation persuaded the staff that there was a reasonable possibility that, upon reopening, the Railroads might be moved by an explicit statement of the Commission's "informal views" to abandon this defense, thus permitting settlement. The staff reopened the Informal Complaint

and, despite the Railroads' lengthy statement in response, attempted to induce settlement by informing the Railroads of its informal view that the statute of limitations defense lacked merit. When this failed, the Commission promptly closed the informal proceeding on April 19, 15 days after its reopening, directing Thomson's attention to Rule 25(f). In reliance on the latter's six-month provision, Thomson filed its 1956 Formal Complaint within six months. Accordingly, the Court agrees with the Commission that the beginning of the six-month extension provided by Rule 25(f) must be measured from the final closing letter of April 19, 1956.

The Railroads further contend that the 1956 Formal Complaint was not sufficiently definite to bar the running of the statute of limitations. However, the requirements for formal and informal complaints are the same, see I.C.C. Rule 29,* and since the formal complaint here referred to the Informal Complaint, which complied with Rule 25(b), the 1956 Formal Complaint was sufficiently definite.

The Railroads' next contention, that the 1956 Formal Complaint was defective because it was not signed and verified by an executive officer of Thomson as required by I.C.C. Rule 17(b), must be rejected for the reason that it is undisputed that it was signed by Pollack, Thomson's representative, as required by Rule 17(a), which would render defects under Rule 17(b) immaterial.**

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* "A formal complaint that includes a request for an award of damages should contain the information specified for an informal complaint seeking damages (Sec. 1.25, paragraphs (b) and (c))."

** Rule 17 provides:

"Sec. 1.17. *Attestation and verification.*

"(a) *Practitioner's signature.* If a party is represented by a practitioner each pleading, document, or paper of such party shall be signed in ink by one such practitioner whose address shall be stated. . . . A pleading document, or paper thus signed need not be verified or accompanied by affidavit except as otherwise provided. . . .

(*footnote continued on following page*)

II. *Thomson's Capacity*

As a second line of attack, the Railroads argue that the remainder of Thomson's claims are barred because in September, 1951 Thomson, an Illinois corporation, was acquired by International Minerals and Chemical Co. ("International" herein) and did not file the 1956 Formal Complaint until five years thereafter. Smith-Hurd Ill. Annot. Stat. Ch. 32, § 157.94 provided:

> "The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution."

This provision was at issue in *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U. S. 120 (1937), where the Supreme Court said:

> "The state law permits such proceedings to be instituted on behalf of a dissolved corporation within two years. . . . After two years, no proceedings may be *initiated* on behalf of the corporation in either state or federal courts, but such proceedings as have been initiated during that period in any of these courts may be prosecuted to completion." (302 U. S. at 128-29)

(*footnote continued from previous page*)

"(b) *When no practitioner's signature.* A pleading, document, or paper not signed by a practitioner must be signed in ink, the address of the signer shall be stated, and the facts alleged in a pleading must be verified under oath by the person in whose behalf it is filed. . . . A pleading, document or paper filed on behalf of a corporation . . . which is not signed by a practitioner must be signed in ink, and the facts alleged in a pleading must be verified by an executive officer of such corporation. . . ."

Since § 157.94 does not set any time limit with respect to proceedings pending at the time of dissolution, and since the Informal Complaint was pending at the time of dissolution, the question is whether the Commission was correct in holding that the 1956 Formal Complaint "may be considered as one phase of a proceeding which was commenced by the filing of informal complaint No. 174417 before the dissolution" of Thomson. 303 I.C.C. at 29.

The Railroads contend that an informal complaint is not a "proceeding" and that, therefore, there was no "proceeding" pending at the time of dissolution in September 1951, so that the two-year limit fixed by § 157.94 expired before the 1956 Formal Complaint was filed; and that even if the Informal Complaint was a "proceeding" pending at the time of dissolution, the 1956 Formal Complaint was a "new" proceeding and therefore time-barred. We conclude, however, that an informal complaint is a pending "proceeding" for the purposes of § 157.94 and that a formal complaint covering the same subject matter is the "same proceeding." Although a formal complaint is filed under a new docket number, it is essentially a continuation of its predecessor informal complaint. Both types of complaints require the same information to state a "cause of action." I.C.C. Rules 25(b), 29. The informal complaint is essentially a means of attempting settlement under Commission authorization; if the attempt fails, the matter proceeds to formal adjudication. The fact that such procedural "escalation" from the stage of supervised settlement to adjudication involves an additional filing by the complainant does not alter the essential identity.

The Railroads further contend that upon its being acquired in September 1951 by International, Thomson lacked capacity as a party to file the 1956 Formal Complaint. The Commission rejected this contention, apparently on the basis of a statement by M. C. Boyle, President of Thomson, that the agreement for acquisition expressly

reserved to Thomson's stockholders the right to recover reparations on the shipments in issue. However, Paragraph 7 of that agreement reserved to Thomson's stockholders only the right to assert freight charge claims with respect to shipments between January 1, 1948 and December 31, 1950. Therefore, the Commission was in error in finding that Thomson retained an interest in claims as to shipments prior to January 1, 1948 and in awarding reparations to Thomson as to such shipments.

The Railroads' additional contention that Thomson cannot collect reparations because it did not pay or bear the freight charges but was merely a broker, must be rejected for the reason that the Commission's contrary finding, approving that of the Examiner, appears supported by substantial evidence. See 303 I.C.C. at 28-29.

III. *The Rates; Interest*

The Railroads' final line of attack is that, on the merits, the Commission erred in concluding, in accord with its previous decision in the 1952 Formal Complaint, 291 I.C.C. 1, that the rates charged were unjust and unreasonable. The Railroads claim that this previous decision was in error because of "th lifferences of transportation characteristics between the shipments in 291 I.C.C. 1 . . . as compared with the shipments in *Diamond,* 256 I.C.C. 747, 259 I.C.C. 75, and *Armour,* 268 I.C.C. 502. . . ." (Pet. of March 27, 1958 at pp. 36-37). In the absence of a more particularized statement of the Railroads' claim that the Commission erred in this respect, the Court concludes that the Commission's finding was supported by substantial evidence.

However, the award of interest for the entire period, a matter within the Commission's discretion, see *George Allison & Co.* v. *I.C.C.,* 107 F. 2d 180 (D. C. Cir. 1939), must be modified in view of the extreme delay in proceeding with this litigation, for which Thomson is at least par-

tially responsible in that it appears to have handled its claims in a piecemeal and dilatory fashion. The Court concludes that it was an abuse of discretion for the Commission to award interest for the period prior to the filing of Formal Complaint 32065 on October 16, 1956.

Conclusion

If this 20-year old case is an illustration of the delays attending invocation of the informal, formal and appeal procedure within the administrative framework established by the Commission, it indicates that something is basically wrong and that the system is woefully in need of a major overhaul. Laudable as the objectives of some of these procedures may appear to be on the surface (e.g., use of the informal complaint to avoid expense involved in formal presentation), their apparent advantages appear to be outweighed by the development of a cumbersome administrative quagmire bordering on the moribund. Even after allowing for the time wasted during the past few years on procedural sparring in the courts, the almost endless labyrinth of delaying steps invoked by the parties before the Commission would make *Jarndyce* v. *Jarndyce* (Charles Dickens' Bleak House) seem like a summary judgment procedure. But the parties must not be penalized for having exploited this costive system with its administrative delays. The remedy lies elsewhere. See Friendly, A Look at the Federal Administrative Agencies, 60 Colum. L. Rev. 429 (1960); Tucker, Renovating the Decisional Process in an Independent Regulatory Commission, XXXV I.C.C. Practitioner's Journal 207 at 208 (Jan. 1968).

Accordingly, partial summary judgment in favor of the Railroads is granted with respect to reparations awarded for shipments prior to January 1, 1948 and with respect to interest awarded for the period prior to October 16, 1956, as to which items the order of the Commission is hereby modified, and as so modified the case is remanded

to the Commission for determination of whether the compromise agreement and payment of $13,071.98 by the Railroads pursuant to the 1950 Special Docket award (No. 218792) constituted full settlement of the claims here under review.

SETTLE ORDER.

WALTER R. MANSFIELD,
U.S.D.J.

Dated: April 1, 1968.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

62 Civ. 2911

THOMSON PHOSPHATE COMPANY,

Plaintiff,

v.

ATLANTIC COAST LINE R. Co., et al.,

Defendants.

ATLANTIC COAST LINE R. Co., et al.,

Cross-Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Cross-Defendants.

This case having been heard upon the summary judgment motion of the defendant railroads, which, as cross-complainants, seek to set aside and annul the reports and orders of the Interstate Commerce Commission entered in its Docket No. 32065, *Thomson Phosphate Co.* v. *Atlantic Coast Line R.R.*, 303 I.C.C. 25, 311 I.C.C. 315; the plaintiff and defendant railroads having stipulated that the disposition of the defendant railroads' cross-petition attacking the Commission's orders would be dispositive of the original action; the parties appearing by counsel having been heard; this Court having concluded in its opinion that the Commission's orders should in several ways be modified and that the case should be remanded to the Commission for determination as to whether a prior

settlement of the involved claims had occurred; and that defendant railroads are entitled to partial summary judgment on their cross-petition.

It is hereby ordered and adjudged that the above-described reports and orders of the Interstate Commerce Commission be, and the same are hereby, remanded to the Interstate Commerce Commission for action consistent with the opinion rendered by this Court; and that the complaint filed herein by Thomson Phosphate Company be held in abeyance pending further Commission action.

Dated: New York, New York, May 16, 1968.

WALTER MANSFIELD,
WALTER MANSFIELD,
United States District Judge.

CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of May, 1968, I served copies of the foregoing Notice of Settlement and Judgment on all parties of record by air-mail, postage prepaid.

NAHUM LITT,
NAHUM LITT,
Attorney.

Judgment Entered
5/20/68

JOHN J. OLEAN, JR.
Clerk.

INTERSTATE COMMERCE COMMISSION

No. 32065

THOMSON PHOSPHATE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

Decided December 2, 1968

Upon reconsideration, payments responsive to a special docket order found not to have discharged carriers' obligation to pay reparation on shipments *pendente lite*.

Appearances as shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION.

HARDIN, *Commissioner:*

The complaints of Thomson Phosphate Company alleging that certain rates charged by defendant railroads on ground phosphate rock were unjust and unreasonable and seeking reparation have had a lengthy history of litigation before the Commission, *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 291 I.C.C. 1 (1953); 293 I.C.C. 369 (1954); 303 I.C.C. 25 (1958); 311 I.C.C. 315 (1960); and before the courts, *Atlantic Coast Line Railroad Co.* v. *United States*, 213 F. Supp. 199 (M. D. Fla. 1963); *I.C.C.* v. *Atlantic Coast Line R. Co.*, 334 F. 2d 46 (5th Cir. 1964); *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U. S. 576 (1966); *Thomson Phosphate Company* v. *Atlantic Coast Line R.*

Co., 282 F. Supp. 698 (S.D.N.Y. 1968). As a result of the last cited court case there remains in issue the validity of the Commission's award of reparation in the amount of $3,802.75, with interest thereon at the rate of 4 percent per annum from October 16, 1956.

The Commission, division 3, in its decision rendered in 1960 (311 I.C.C. 315) awarded reparation in the amount of $8,889.76 with interest on 639 shipments of ground phosphate rock transported from Prairie, Fla., to points in Illinois during the period April 11, 1945, through October 21, 1950. The defendants refused to pay, and the complainant thereupon brought an action in the United States District Court for the Southern District of New York to enforce the Commission's reparation order; the defendants filed a cross-complaint thereto. The litigation in the Southern District of New York was stayed pending determination of procedural issues ultimately decided by the Supreme Court in 1966. In its opinion at 282 F. Supp. 698 (S.D.N.Y. 1968), the court held that the complainant, insofar as the instant proceeding is concerned, only retained the right to reparation for shipments moving between January 1, 1948, and December 31, 1950, because of an agreement of sale between the complainant's shareholders and the International Minerals and Chemical Company. Thus, the court found that we were in error in allowing reparation for shipments moving prior to January 1, 1948. See appendix A to this report for a listing of the 216 shipments transported during the years 1948 through 1950 that remain in issue. The court also found that it was an abuse of our discretion to award interest to the complainant for the period before October 16, 1956, the date that this complaint was filed. Our orders were accordingly modified by the court. Finally, the court remanded the proceeding for a determination of whether the compromise agreement and the payment of $13,071.98 by the railroads pursuant to the 1950 special docket award constituted full settlement of the claims in issue.

After giving due weight to the Commission's authority to reverse the Examiner, this Court is forced to conclude that the record fails to reveal substantial evidence supporting the Commission's reversal and contrary conclusions. It may be that the Commission's reversal is supported by evidence to the effect that the 1950 compromise was limited to specific shipments so that the claims relating to shipments subsequent to April 7, 1945 survived. If so, such evidence is not in the record before us. In view of the Examiner's contrary findings, the Court would be justified in inferring that the parties followed a procedure not unusual in the settlement of ordinary litigated claims, i.e., to enter into a compromise of all outstanding claims but provide that the settlement on the record would take the form of an order directing payment with respect to certain specific claims. In view of the fact that the informal procedure in effect results in the Commission's putting its imprimatur upon the form presented by the parties, the Examiner's finding that there was a full and complete settlement of all claims cannot be disregarded. Accordingly, in the absence of any findings by the Commission, the matter must be remanded to the Commission for determination of this basic issue.

By order of July 11, 1968, as amended by order dated July 24, 1968, we vacated and set aside the prior order of division 3 (311 I.C.C. 315) and reopened the proceeding for reconsideration of the issues of interest, contract interpretation, and satisfaction, on the present record. Further discussion of the issues of interest and contract interpretation, insofar as it relates to purchase of complainant by International Minerals and Chemical Company, is not warranted.

On May 20, 1946, the complainant filed an informal complaint alleging that the rates charged on ground phosphate rock from Prairie to Illinois destinations were unjust and unreasonable. By letter of December 4, 1947, it notified the Commission that the complaint was also to embrace shipments moving *pendente lite*. On December 17, 1947, the railroad defendants offered to pay reparation "on all of the shipments involved in this informal complaint upon which the statute of limitations has not run," and the complainant replied that it accepted this basis. The defendants thereupon requested authority from the Commission, in Special Docket No. 218792, to pay reparation of

$13,012.51 to the complainant for unreasonable charges on 185 shipments transported prior to April 7, 1945. By order of September 19, 1950, the defendants' request was granted. Payment was made on November 17, 1950, by a check endorsed "payment in full." The examiner found that the informal complaint became the subject of a compromise offer and was accepted by the complainant without reservation. He reasoned that the contract resulting therefrom was, in effect, approved by the Commission by the special docket order. Division 2, in its prior report (303 I.C.C. 25), reversed the examiner and awarded reparation without, however, discussing the issue of whether the claim had been compromised by complainant's accepting the check endorsed "payment in full."

DISCUSSION AND CONCLUSION

Our order of September 19, 1950, authorized the railroads to pay reparation on 185 specifically enumerated shipments. That order did not by its terms authorize the railroads or the complainant to compromise any other claims that might be outstanding. If the order were to be interpreted as authorizing compromise of other claims of which the Commission was not made aware, other than for purposes of tolling the statute of limitations, it would make a mockery of the provisions of the Interstate Commerce Act requiring carriers to adhere to the published tariff unless and until modified by the Commission so as to prevent discrimination between shippers and secret rebates and concessions. Carriers and shippers alike are required to adhere to the published tariff provisions unless modified by the Commission. Hence, carriers are not free to negotiate settlements with the shippers on the basis of something less than or more than the published tariff rate, nor are carriers free to bargain with shippers so as to preclude shipper referral of alleged overcharges to the Commission for determination.

An award of reparation in the basis of enumerated shipments with the amount of reparation computed on a per shipment basis depending on origin, destination, weight or other factors provides a guide as to how future controversies or informal complaints will be decided but does not, in our opinion, provide a basis for finding that a shipper has waived a statutory right to reasonable rates. The carriers' assertion, that Thomson Phosphate entered into a "contract of settlement" with them by endorsing a check marked "payment in full," even if accurate within the terms of contract law, is of no import when considered in connection with the Commission's informal procedure. Informal complaint procedure is designed to facilitate settlement of controversies, and every step of the procedure is intended to accomplish this end. Thus, when a shipper files an informal complaint covering a large number of shipments, it is not unusual for the carriers to submit more than one special docket application with regard to the shipments embraced in the informal complaint. This allows the carriers considerable convenience in breaking down the application by territory, rate group, originating or delivering carriers, date of shipment, and other such classifications, which in the normal situation expedites settlement of claims. For this reason, a special docket application and order cover only the particular shipments detailed therein.

One other matter requires consideration at this time. There is no question that our informal procedures which are designed to expedite agreements between parties and foster settlement of controversies have been abused in this proceeding and that inordinate delay has occurred. In this connection, we note the court's statement that this proceeding "would make *Jarndyce* v. *Jarndyce* (Charles Dickens' Bleak House) seem like a summary judgment procedure." Fortunately, the instant proceeding is the exception rather than the rule. In general, our informal procedures have benefited both the shipping public and

the transportation industry. During calendar year 1967, for example, 2,198 cases were disposed of on the informal case docket with the average number of months needed to decide each being only 2.44 months. Only 34 informal complaints closed during that period of time involved more than 12 months between filing and settlement. Though with hindsight it now appears that the Commission was lax in not forcing the parties either promptly to agree on a basis for settlement under informal docket procedure or to litigate this matter before the Commission, much of the blame must be placed at the doorsteps of the parties for their dilatory practices. We believe, in particular, that the complainant's piecemeal method of presenting this matter to the Commission for determination represents the primary cause of delay. Steps have been taken, and further steps will be taken if necessary, to prevent similar occurrences in the future.

Upon reconsideration, we find that the payments made by the defendants on November 17, 1950, responsive to the Commission's order of September 19, 1950, did not operate to discharge their obligation to make reparation for unjust and unreasonable rates assessed on shipments made *pendente lite.*

And we further find, that the complaint is entitled to reparation on shipments moving between January 3, 1948, and October 21, 1950, from the defendants in the accompanying order in the amounts set opposite their respective names in appendix C hereto, aggregating $3,802.75, with interest from October 16, 1956.

It is ordered, That the defendants named in appendix A hereto, according as they participated in the transportation, as shown in appendix C hereto, be, and they are hereby, authorized and directed to pay unto the complainant, Thomson Phosphate Company, on or before January 20, 1969, the sum of $3,802.75, with interest thereon at the rate

of 4 percent per annum from October 16, 1956, as reparation on account of unjust and unreasonable rates charged for the transportation of the carload shipments, detailed in appendix A hereto, of ground phosphate rock from Prairie, Fla., to numerous destinations in Illinois, on and between January 3, 1948 and October 21, 1950, all as described in this report and the prior reports at 303 I.C.C. 25 and 311 I.C.C. 315, which are hereby made a part hereof, as modified hereby.

By the Commission.

H. NEIL CARSON,
Secretary.

(SEAL)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

62 Civ. 2911

THOMSON PHOSPHATE COMPANY,

Plaintiff,

against

ATLANTIC COAST LINE R. Co., et al.,

Defendants.

ATLANTIC COAST LINE R. Co., et al.,

Cross-Plaintiffs,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Cross-Defendants.

MANSFIELD, D.J.

Pursuant to our decision dated April 1, 1968, 282 F. Supp. 698 (S.D.N.Y. 1968), the above proceeding was remanded to the Interstate Commerce Commission for reconsideration to determine whether a compromise agreement and payment of $13,071.98 by the defendant railroads to Thomson, as authorized by a special docket award dated September 19, 1950, constituted full settlement of all claims in issue, as found by the Examiner, or was limited to pre-April 1945 claims, as the Commission concluded without stating the basis of its decision. By its report and order dated December 2, 1968, 332 I.C.C. 641, the Commission,

upon reconsideration, found that the payment made by the railroads did not operate to discharge their obligation to make reparation with respect to shipments other than those specifically scheduled in the special docket award. Defendants now move for summary judgment setting aside the Commission's report and order. For the reasons stated below, the motion is denied.

Having for the first time the benefit of the Commission's reasoning, we are persuaded, for the reasons stated by the Commission in its report and order on reconsideration, that the railroads' payment, notwithstanding their characterization of the compromise offer and the endorsement of the settlement check as "payment in full," did not discharge claims for reparation with respect to shipments other than those specified in the Commission's special docket award. By its express terms that award purported to dispose of claims only with respect to 185 specified pre-April 1945 shipments. In view of the Examiner's decision we speculated that the parties might have compromised all claims but cast the settlement in a form limited to the 185 specified claims, and accordingly remanded the question for further reconsideration by the Commission. Upon reconsideration the Commission points out that carriers are not free to negotiate settlement on the basis of part payment of some claims, since such a procedure would preclude Commission determination of alleged overcharges on undisclosed shipments and permit carriers to avoid their legal obligations with respect to tariffs due on the latter shipments simply by not advising the Commission of such claims. Since settlement on such a basis is not permitted and no such authorization was granted here, the authorization for the compromise agreement and payment was limited to the specific claims scheduled. If the railroads desired to include claims with respect to other shipments, they should have been made the subject of a docket application or at least referred to in the authorization.

Accordingly defendants' motion for summary judgment setting aside and annulling the Commission's Report and Order on Reconsideration is denied.

It is so ordered.

WALTER R. MANSFIELD,
U.S.D.J.

Dated: November 24, 1969.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 148-49—September Term, 1970.

(Argued October 28, 1970 Decided November 24, 1970.)

Docket Nos. 34582/35010

THOMSON PHOSPHATE COMPANY,

Plaintiff-Appellee,

—against—

ATLANTIC COAST LINE RAILROAD COMPANY, *et al.*,

Defendants-Appellants.

ATLANTIC COAST LINE R.R. CO., *et al.*,

Cross-Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Cross-Defendants-Appellees.

Before:

MOORE, FRIENDLY and ADAMS,*

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Walter R. Mansfield,

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* Of the Third Circuit, sitting by designation.

Judge, denying cross-plaintiffs-appellants' motion for summary judgment to set aside and annul a report and order of the Interstate Commerce Commission.

Affirmed.

J. EDGAR MCDONALD, New York, New York, *for Defendants-Appellants and Cross-Plaintiffs-Appellants, Atlantic Coast Line Railroad Company, et al.*

HARRY TEICHNER, Brooklyn, New York, *for Plaintiff-Appellee, Thomson Phosphate Company.*

JEROME SHARFMAN, Attorney, Interstate Commerce Commission, Washington, D. C. (Leonard S. Goodman, Associate General Counsel, Robert W. Ginnane and Nahum Litt, Attorneys, and Fritz R. Kahn, General Counsel, Interstate Commerce Commission, Washington, D. C., of counsel), *for Cross-Defendant-Appellee, Interstate Commerce Commission.*

UNITED STATES DEPARTMENT OF JUSTICE, Washington, D. C. by William D. Ruckelshaus, Assistant Attorney General, Morton Hollander and Patricia S. Baptiste, Attorneys; and Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y. and Michael D. Hess, Assistant United States Attorney, New York, New York), *for Cross-Defendant-Appellee, United States of America.*

PER CURIAM

For more than twenty-four years—using a procedure designed to expedite claims—the shipper and carrier in this action have been disputing the proper rate to be applied

to ground phosphate rock shipped by rail from Florida to Illinois during the 1940's.

The issue on this appeal is whether a reparation order by the Interstate Commerce Commission ("Commission") resolving this matter should be set aside, or whether the action brought by the shipper, Thomson Phosphate Company, to enforce the order should be granted. The history of Thomson's hoary claim against Atlantic Coast Line Railroad ("ACL") is set forth at length in the opinion by the Honorable Walter R. Mansfield, United States District Court for the Southern District of New York, at 282 F. Supp. 698 (1968). Judge Mansfield partially remanded the matter to the Commission whose subsequent order upon reconsideration appears at 332 I.C.C. 641 (1968). The District Court in an unreported decision dated November 24, 1969 found that there was substantial evidence in the record to support the supplemented position of the Commission and denied ACL's motion for summary judgment to set aside the Commission's new order.

First, ACL contends that Thomson's claim was entirely resolved in 1950 when the Commission approved a "settlement" agreed to by the parties. The Commission answers, however, that it approved only the reparation settlement offered for 185 shipments moving prior to April, 1945. Thomson claims and the Commission found that this reparation payment by ACL did not discharge ACL's obligation for shipments moving after that date. ACL agrees that a carrier may not pay to a shipper reparations other than those authorized by the Commission. However, ACL argues that because only one complaint by Thomson was filed and Thomson alone knew how many shipments were involved, Thomson's acceptance of ACL's offer to settle the complaint, and the Commission's approval of that settlement, concluded the matter. Notwithstanding the compromise offer and the notation on ACL's settlement check stating "in full payment," the Commission viewed the matter as not settled in full, but settled solely with respect to

the 185 specified shipments. Noting that the Interstate Commerce Act invests the Commission with a broad responsibility to police tariffs and rebates, the District Court found substantial evidence in the record to support the Commission's decision. We cannot say this conclusion is clearly erroneous within the meaning of Fed. R. Civ. P. 52(a).[1]

ACL also raises the statute of limitations as a bar to Thomson's claim. Although ACL points to several instances when it asserts that Thomson's claim expired under the statute, the most important contention concerns the closing of Thomson's informal complaint in March ,1956, and the delay of more than six months until October 16, 1956 in the filing of a formal complaint. Rule 25(f) of the Commission's General Rules of Practice, 49 C.F.R. 1.25(f), provides as follows:

> "If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional fact basis. * * *"

This Rule tolls the running of the two year statute of limitations provided in 49 U.S.C.A. § 16(3)(b) for complaints against carriers based on overcharges.

On March 29, 1956, the Secretary of the Commission wrote to Thomson, briefly restating the history of the complaint and advised Thomson that in view of the "adverse attitude" of ACL, the complaint could not be disposed of on the Commission's informal docket. In response to the Commission's letter, Thomson replied on March 31st that the only reason ACL was now adverse to settlement was

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[1] "Findings of fact shall not be set aside unless clearly erroneous. * * *"

ACL's view that the Commission had not reopened the informal complaint in 1952 and therefore the statute of limitations had run at that time. Since the Secretary had reaffirmed in his letter of March 29th that the Commission had reopened the informal complaint in 1952, Thomson argued ACL could now see that its position was erroneous, and therefore the informal complaint should be reopened to enable the parties to reach an agreement now that the events of 1952 were clarified. In view of Thomson's comments, the Commission reopened the informal complaint on April 4th. After further correspondence and ACL's adherence to its claim that the statute had run, the Commission again closed the informal complaint on April 19th. Thomson filed a formal complaint on October 16th.

The District Court refused to treat the Commission's reopening from April 4th to April 19th as a nullity, and thereby found Thomson's formal complaint to have been filed within the six month period specified by the Commission's Rule 25(f). We cannot conclude, as a matter of law, that the Commission erred in reopening the informal complaint. The purpose of the informal docket is to facilitate negotiated settlements between shippers and carriers at less expense than formal litigation. While ACL contends "there is not the slightest doubt as to the meaning of the words 'on an additional fact basis,' " the words must be construed in the context of a regulatory scheme which seeks to avoid the heavy burden of litigation where there is a reasonable possibility of negotiated settlement. The Commission has previously indicated a willingness to reopen cases on a "new fact basis" where the only new fact is a fresh argument by the complainant. See *Southland Company* v. *Southern Ry. Co.*, 300 I.C.C. 9 (Dec. 2, 1957).

As applied to this case, we cannot conclude that this interpretation of the Commission's rule is arbitrary or clearly erroneous.[2]

Accordingly, the order of the District Court will be affirmed.

ARLIN M. ADAMS,
Circuit Judge

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[2] For the standard to be applied in reviewing an administrative agency's interpretation of its own rule, see generally *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945); *Western Union Telegraph Co.* v. *United States*, 217 F. 2d 579 (2d Cir. 1954); 4 Davis, *Administrative Law Treatise*, § 30.12 (1958).

34582, 35010

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

THOMSON PHOSPHATE COMPANY,

Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,

Defendants-Appellants.

ATLANTIC COAST LINE R.R. Co., et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

LEONARD P. MOORE,
HENRY J. FRIENDLY,
ARLIN M. ADAMS,
Circuit Judges.

January 4, 1971

Supreme Court, U.S.
FILED
APR 21 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

THOMSON PHOSPHATE COMPANY,
Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Petitioners.

ON PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THOMSON PHOSPHATE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HARRY TEICHNER,
66 Court Street,
Brooklyn, N. Y. 11201,
Attorney for Respondent,
Thomson Phosphate Company.

April 15, 1971.

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BRIEF FOR THE RESPONDENT, THOMSON PHOSPHATE COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Question Presented

The respondent, Thomson Phosphate Company, is dissatisfied with the petitioner's presentation of the "Question Presented". Rules of U. S. Supreme Court, Rule 40 (3).

The allegation of the question presented is improper because it states the erroneous conclusion that Rule 25 (f) of the General Rules of Practice Before the Commission, 49 C.F.R. 1.25 (f), was not complied with. The Commission, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit have found that the requirements of said Rule 25 (f) were met and justified the reopening of the informal complaint. The petitioners disagree with that finding of fact and the only question presented is

> Whether Thomson's informal complaint was reopened by the Interstate Commerce Commission in compliance with its General Rules of Practice and the Interstate Commerce Act.

ARGUMENT

The petitioners have failed to show any special or important reason why this Court, in the exercise of sound judicial discretion, should review this case on writ of certiorari.

Rule 19 (1) (b) of the Rules of this Court, though neither controlling nor fully measuring this Court's discretion, sets forth the character of reasons which will be considered in passing upon a petition for certiorari to a court of appeals. The petitioner attempts to make out one of those reasons, *viz.* that the Court of Appeals for the Second Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court. The respondent, Thomson Phosphate Company, however, respectfully submits that neither that nor any other reason exists for granting the writ.

This case does not present any important question of federal law

Rule 25 (f) of the Commission's Rules of Practice requires that a resubmission of an informal complaint be

made upon an additional fact basis. The existence of that rule is not questioned. The Commission, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit have held that there was compliance with the Rule. However, the petitioners disagree and contend that there was no compliance. It is respectfully submitted that it is not the customary function of this Court on certiorari to review the record to make its own determination on a question of fact, such as whether there was compliance with Rule 25 (f).

Parenthetically, any findings of fact and conclusions of law by the Florida District Court and by the Court of Appeals for the Fifth Circuit must be disregarded by reason of the fact that this Court held in *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U. S. 586, that the Florida District Court was without jurisdiction to entertain the action.

There is no conflict between the decision below and prior Commission decisions

There is no merit to the petitioners' suggestion that the decision below is in conflict with prior Commission decisions. The Commission has found that under the facts and circumstances here present, an additional fact basis existed for the reopening of the informal complaint. In making such determination the Commission exercised no discrimination, preference or prejudice in the application of Rule 25 (f). This action was consistent with prior Commission decisions.

The petitioners' contention that the Commission's findings and orders are not supported by substantial evidence is an unwarranted conclusion. The record clearly supports the action of the Commission.

Certiorari is not appropriate

The petitioners would have this Court review every case where an informal complaint before the Commission has

been reopened on an additional fact basis, for *de novo* determination by this Court as to whether an additional fact basis existed in support of such reopening. It would be a work of supererogation to demonstrate that such procedure is not the purpose of certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respecfully submitted,

HARRY TEICHNER,
Attorney for Respondent,
Thomson Phosphate Company.

April 15, 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1539

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,

PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 63a–68a) is reported at 434 F. 2d 180. The first opinion of the district court (Pet. 30a–52a) is reported at 282 F. Supp. 698; its opinion (Pet. 60a–62a) following remand to the Commission has not been reported.

JURISDICTION

The order of the court of appeals was entered on November 24, 1970. A petition for rehearing was denied on January 4, 1971. The petition for a writ of

423-840—71

certiorari was filed on April 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a shipper's acceptance of a check issued by a railroad in payment of reparations awarded by the Interstate Commerce Commission, which was marked "payment in full," barred the shipper from subsequently asserting before the Commission other reparations claims against the carrier.

2. Whether the shipper's subsequent reparations claims were timely filed.

STATUTE AND RULES INVOLVED

Section 16(3)(b) of the Interstate Commerce Act provides in pertinent part:

> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after * * *.

Rule 25(f) of the Commission's General Rules of Practice and Procedure, 49 C.F.R. 1100.25(f), provides in pertinent part:

> (f) *Six months' rule.* If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a

> formal complaint as to such mater is filed, or it is informally resubmitted on an additional fact basis.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings of fact [by the district court] shall not be set aside unless clearly erroneous * * *.

STATEMENT

On May 20, 1946, Thomson Phosphate Company filed an informal complaint with the Interstate Commerce Commission alleging that certain rates charged by railroads for the transportation of ground phosphate rock during the previous two years were unreasonable; it sought an order for payment of statutory reparations. During these informal proceedings Thomson took the position that its complaint also covered charges incurred during the pendency of the proceedings. In December 1947, the Atlantic Coast Line Railroad, as the originating carrier, offered to pay reparations "on all shipments involved in this informal complaint upon which the statute of limitations has not run" (Pet. 32, 33a).[1] In September 1950 the Commission directed that the railroads pay Thomson $13,012.51 as reparations on 185 specified shipments moved during the period up to April 7, 1945. Payment was made in November 1950 by a check bearing the phrase "payment in full." Thomson then requested additional reparations, pursuant to its informal com-

[1] The two opinions of the district court contain a summary of the complex history of the instant litigation (Pet. 30a–50a 60a–62a).

plaint, for shipments which had moved after April 7, 1945.

In June 1952, following correspondence between the Commission and the parties, the Secretary of the Commission advised Thomson that the informal proceedings were closed, since its further claims were not susceptible of informal settlement. Within six months (in October 1952), Thomson filed a formal complaint for reparations on shipments to five destinations previously covered by the informal complaint but not included in the 1950 award; this was followed by its request to reopen the informal complaint with respect to additional shipments which had also been covered by the original informal complaint and not satisfied by the prior award. Thomson further requested that the informal complaint be held in abeyance pending disposition of the formal proceeding (Pet. 33a–34a). The request was granted by the Commission in late December 1952 and it reopened the informal complaint "as originally filed" (Pet. 33a–34a).

Disposition of the formal complaint led to an award by the Commission of $1,463.80 (see 291 I.C.C. 1, 293 I.C.C. 369) which was paid by the railroads in October 1955. Payment was accompanied by the statement that it was "payment in full of all matters involved in * * * [or] growing out of that informal complaint" (Pet. 34a). In acknowledging receipt of the payment, Thomson referred to the continuing pendency of the informal complaint seeking

reparations for other outstanding claims, and requested settlement of them.

Further informal proceedings were then conducted but proved to be unproductive; consequently on March 29, 1956, the informal complaint proceeding was closed by the Commission. At the request of Thomson this proceeding was reopened on April 4, 1956; it again proved unproductive and was finally closed on April 19, 1956. Thomson thereupon filed a second formal complaint on October 16, 1956 (less than six months after the last closing on April 19), relating to shipments during the period of April 10, 1945, to December 31, 1950. This proceeding culminated in an award of $8,889.76 by the Commission in 1960 (311 I.C.C. 315).

In August 1962, Thomson instituted enforcement proceedings against the railroads in the United States District Court for the Southern District of New York. The railroads filed a cross-petition for review [2] attacking the award under the second formal complaint on a variety of grounds, including the allegation that the complaint to the Commission was untimely.

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[2] In September 1961, having refused to comply with the 1960 order of the Commission, the railroads had brought suit in the United States District Court for the Middle District of Florida to set aside the Commission's order. The subsequently instituted enforcement proceedings in the Southern District of New York were held in abeyance pending the outcome of this suit. Decision in favor of the railroads was ultimately reversed by this Court on jurisdictional grounds; the Court held that the railroads could file a cross-action in the court in which the enforcement action was pending. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576. That was done.

The district court, *inter alia,* rejected the claim that the two-year limitation period of Section 16(3)(b) (*supra* p. 2) had run; it concluded that the original 1946 informal complaint had sufficiently encompassed the claims said to be barred by the statute (Pet. 36a–38a). It also rejected the contention that the informal complaint of 1956 was barred under the "six months'" standard of Rule 25(f) of the Commission's Rules of Practice (see *supra,* pp. 2–3). As to this, the court reasoned that the Commission had properly reopened the informal complaint on April 4, 1956, on the "additional fact basis" provided by the Rule. (Pet. 42a–45a). The district court reduced the award from $8,889.76 to $3,802.75 for reasons not here relevant (Pet. 49a). As thus modified, it remanded the case to the Commission to reconsider its reversal of the Hearing Examiner's conclusion that the compromise agreement and payment of $13,071.98 under the 1950 award constituted full settlement of all Thomson's claims (Pet. 50a, see also Pet. 38a–40a).

On remand the Commission determined (Pet. 56a–59a; 332 I.C.C. 641) that its 1950 order had authorized the payment of reparations on only 185 specifically enumerated shipments and that the order "did not by its terms authorize the railroads or the complainant to compromise any other claims that might be outstanding" (Pet. 56a). It stated that the railroads were not free to negotiate a settlement on the basis of something less than the tariff rate, or to bargain with shippers so as to preclude the latter from presenting claims to the Commission; it accordingly concluded

that the 1950 check with the phrase "payment in full" did not terminate the pending informal complaint (Pet. 56a–57a).

The district court sustained the Commission's decision[3] and reparations award of $3,802.75 (Pet. 60a–62a). The court of appeals affirmed (Pet. 63a–68a).

ARGUMENT

The decision below is correct and presents no question warranting further review.

1. The courts below properly held that the amount paid by the railroads in 1950 with a check marked "payment in full" did not settle all of Thomson's claims. As the Commission made clear on remand, its 1950 order authorized reparations on only 185 specifically enumerated shipments and did not "authorize the railroads or the complainant to compromise any other claims that might be outstanding" (Pet. 56a). As the Commission stressed, any different conclusion could result in "secret rebates and concessions" and consequently "make a mockery" of its statutory authority to fix rates and require adherence thereto (Pet. 56a). For these reasons, it concluded that all negotiations between carrier and shipper concerning rates had to be conducted with the knowledge and approval of the Commission and that no private settlement

[3] The court adopted the Commision's view that "carriers are not free to negotiate settlement on the basis of part payment of some claims, since such a procedure would preclude Commission determination of alleged overcharges on undisclosed shipments and permit carriers to avoid their legal obligations with respect to tariffs due on the latter shipments simply by not advising the Commision of such claims" (Pet. 61a).

could bar a shipper from complaining to the Commission of unreasonable rates. The courts below properly recognized these sound policy considerations[4] in upholding the Commission.

2. The further contention that Thomson's additional claims for reparations were barred by limitations are fully answered in the original opinion of the district court (Pet. 36a–45a), as affirmed by the court of appeals (Pet. 66a–67a). It is sufficient to observe here that since the April 4, 1956, reopening did not constitute a violation of the six months' provisions of Rule 25(f), the formal complaint filed on October 15, 1956, was timely. As the court of appeals pointed out, the Commission has interpreted the Rule 25(f) requirement of "a new fact basis" for reopening as being satisfied by "a fresh argument by the complainant"; that, as the opinion below makes clear, was the

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[4] The validity of the Commission's position is reinforced by its explanation of how the informal complaint procedure tends to facilitate settlements (Pet. 57a):

> [W]hen a shipper files an informal complaint covering a large number of shipments, it is not unusual for the carriers to submit more than one special docket application with regard to the shipments embraced in the informal complaint. This allows the carriers considerable convenience in breaking down the application by territory, rate group, originating or delivering carriers, date of shipment, and other such classifications, which in the normal situation expedites settlement of claims. For this reason, a special docket application and order cover only the particular shipments detailed therein.

While the Commission recognized that the purpose of expedition had not been achieved in this particular case, it stressed that "[f]ortunately the instant proceeding is the exception rather than the rule" (Pet. 57a–58a).

situation here (Pet. 67a). Moreover, as the court of appeals noted, the language of the Rule "must be construed in the context of a regulatory scheme which seeks to avoid the heavy burden of litigation when there is a possibility of negotiated settlement" (*ibid.*). In this posture the Commission properly ruled that the time limitations of the rule had not been violated. See *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413–414; *Udall* v. *Tallman*, 380 U.S. 1, 4.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY, 1971.

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[5] In this case, the Commission applied the correct standard—the additional fact basis—to a particular set of facts. That it may in the past have applied the same standard differently in different factual contexts hardly supports the claim (Pet. 23–28) that it discriminated in this case.

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